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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
Petitioners,

vs.

KATIE MAE ANDREWS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. .....

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vs.

KATIE MAE ANDREWS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered February 3, 1975.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 507 F.2d 611 (1975). It appears hereto as Appendix "A". The opinion of the United States District Court for the Northern District of Mississippi, reported at 371 F.Supp. 27, is included as Appendix "B".

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 3, 1975. This Petition for a Writ of Certiorari is being filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a person has a right derived from or protected by the United States Constitution to bear illegitimate children.

2. Whether the failure to employ plaintiffs in defendants' school district because they were unwed parents of illegitimate children impinges upon some provision of the United States Constitution.

3. Whether a school district rule, neutral as to sex and race, which excludes parents of illegitimate children from consideration for employment as teachers or teacher aides in a small rural school district[1] violates the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. §§1981, 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000(d), et seq., and the Fifth and Fourteenth Amendments to the Constitution of the United States. The plaintiffs, both being single and parents of illegitimate children, sought an

1. The Drew Municipal Separate School District is a small school district located in a rural Mississippi Delta town. The town of Drew has a population of 2,574 individuals according to the 1970 United States Census Report.

injunction voiding the school district's rule which excluded unwed parents of illegitimate children, both male and female, from consideration for employment as teachers and teacher aides. The plaintiffs also requested the district court to require the defendants to enter into contracts of employment with them. The district court found the regulation to be unconstitutional as violative of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States[2] and required the defendants to execute contracts of employment with the plaintiffs.

The rule was adopted based upon the judgment that the role of a teacher, apart from imparting instruction, is to mold character and development through being a "role model." (Petty, Trans. p. 6) The rule was not promulgated to automatically deny consideration for employment as teachers and teacher aides of unwed parents of illegitimate children on the basis that such parents are immoral, but on the basis that such parents regardless of their present status of morality are improper models for the many roles occupied by the teacher—"educator, adviser, friend and, at times, parent-substitute"—during the formative years of primary and secondary education. *Goss v. Lopez*, ... U.S. ....., 42 L.Ed.2d 725, 95 S.Ct. 729 [No. 73-898], decided January 22, 1975 (Powell, J., dissenting).

The rule is rested on educational considerations; the superintendent's testimony is clear that educational reasons were involved. (Id., pp. 7, 8)

The superintendent's testimony concerning morals has been overworked and misapprehended by the lower courts.

2. The district court determined in the alternative that the rule was a sex-based classification and therefore inherently suspect, but the court of appeals did not address itself to this issue since it affirmed the district court "upon traditional equal protection grounds." Footnote 5 of Opinion of Court of Appeals.

The superintendent was not saying that the rule necessarily would separate the moral from the immoral in litmus paper fashion. Rather, his moral concern was that in the school year 1971-1972, twenty-eight girls ranging in age from thirteen to seventeen dropped out of school because of pregnancy. (Id., p. 8) He believed that the influences created by application of this rule would arrest this trend. Without insinuation that those who fell afoul of the rule were necessarily presently immoral, the superintendent believed that unwed parents of illegitimate children in teaching positions would add to rather than help arrest this alarming trend in his district. (Id., p. 9)

In this case of first impression, sociological and psychological testimony was preeminently important. The district court only paid lip service to the expert testimony, 371 F.Supp. 31, as being of a "judgmental nature unsupported by any studies that provide a solid factual basis for their conclusions." Shunning these important opinions of experts, the court rested its decision primarily on *a priori* assumptions as to the invalidity of the classification without considering how the classification works in practice. It is for this reason that the testimony of the experts, both pro and con, deserves considered attention.

Dr. Kenneth Clark, noted sociologist, while testifying for the plaintiffs, conceded much importance to "role modeling," wherein growing individuals derive models for their own behavior and attitudes and feelings from adults and teachers. (Deposition, p. 15) He further admitted that teachers not only communicate academic knowledge but communicate an approach to living and a style of life. (Id., p. 17) He acknowledged that anything which became a controversy or a point of notoriety would possibly affect students. (Id., p. 25)

Dr. Ernest van den Haag, scholar and writer in the fields of education, sociology and psychology, identified and elaborated upon a rational basis for the rule of the Drew Municipal Separate School District. He testified that the family and monogamous marriage are protected American institutions. (Deposition of Dr. van den Haag, p. 8) Sexual activities are and have been regulated within the social and legal norm of marriage. It then follows, according to Dr. van den Haag, that those who do not conform to the institution of marriage "are legitimately made to suffer some disadvantages, particularly if they deliberately fail to follow that institution." (Id., p. 8)

Teachers, in van den Haag's view, perform two functions: (1) They teach cognitive knowledge to their students, and (2) "transmit and, inseparably from this cognitive knowledge, the cultural heritage of the society or community in which they are employed." The cultural transmission role is particularly strong in the lower grades, since the primary influences on children are the home and the school. The emotional attitudes of the teacher are readily communicated to his students by the teacher's personality and conduct. The authority of the teacher turns on his acceptance by the pupil. The acceptance reaches the degree of receiving the teacher as a person wherein the students:

> "take as a model to some extent, and identify with and, in fact, in effect, build their own identity on the teacher's general conduct, behavior, etc., to the extent to which they are aware of it." (Id., pp. 9-11)

The importance of proper role models is central to Dr. van den Haag since "students seem to have sources of information that I never have been able to fully find out, but they seem to always know everything about their teachers." (Id., p. 11) Because Drew is a small town with a small school, Dr. van den Haag believed that "whether

by gossip or information or general curiosity about the lives of adults, that the students would know" about the private lives of their teachers. (Id., p. 13) There is an accompanying danger, according to van den Haag, that children fond of a particular teacher would accept that teacher totally and therefore accept her behavior that the surrounding community regards as unacceptable. (Id., p. 14) Dr. van den Haag believes that even arithmetic teachers in grade school will tend to communicate with the children on an emotional basis about everyday events and occurrences even within their own family. (Id., p. 16) It will simply be unavoidable that the teacher would express his own values in the classroom. Finally, van den Haag believes that education in the lower grades is not just a matter directed to the intellect:

> "Children learn and learn only because they like their teacher and wish to please him. Children learn for the love of the teacher, so to speak. This is less so as the children grow older, but it never stops. It is hard to learn from a teacher you don't care for; impossible for a young child, I would say." (Id., p. 18)

The teacher cannot teach any subject unless a child accepts him, likes him, and admires him. Along with role modeling there exists role assimilation in which children assume and learn to assume an identity of their own formed by and incorporating part of the personality, conduct and values of adult models.

Schooling as seen by Dr. van den Haag is an effort to impart the selected cultural heritage of the society of which one is a part. This cultural transmission is a selective process. All the bad traits of a national character such as propensity for crimes of violence should be avoided and ideas of honesty, proper behavior and restraint or avoidance of certain sexual practices, including those the subject of the regulation, should be taught. (Id., p. 24)

Dr. van den Haag also highlighted the emphasis of the rule upon status and not morality. In practice, it would be impossible to regulate whether a prospective teacher had extra or premarital sex. On the other hand, the status of having an illegitimate child will be readily observable in a town such as Drew.

The rule clearly regulates the situation of an individual having an illegitimate child rather than the situation of an individual engaging in premarital sex. (Id., p. 30)

Addressing the issue of the supposed severability of teachers' conduct from students' values and inferentially their sexual practices, Dr. van den Haag commented:

> "The impact varies with the degree of like and admiration that the students have for the teacher. But the impact is invariably great in elementary grade schools and up to, I would say, junior high school. . . . There are, I think, numerous biographies and autobiographies of people who report on the impact that an admired teacher had on their own development and personality. I think that it is indisputable that when you have daily and intimate and extended contact with a person much older than you and you are very young and plastic, so to speak, that person will, whether he wants to or not, influence you and participate in the formation of your personality." (Id., pp. 45-46)

The vital center of Dr. van den Haag's testimony is that children are sent to school to learn useful and accepted patterns of society and to internalize them. "They internalize them not so much by what the teacher formally teaches but what he is and does in their relation to him."

Since the Court of Appeals for the Fifth Circuit affirmed on limited grounds, there is no question before this Court in regard to whether the rule discriminates on the basis of race and/or sex.

REASONS FOR GRANTING THE WRIT

I.

The Writ of Certiorari should be granted since the district court's finding that the defendants' failure to employ the plaintiffs was based upon a constitutionally impermissible reason, i.e., the bearing of illegitimate children, conflicts with the Court's decisions in Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701, and Perry v. Sindermann, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694.

The district court lacked jurisdiction to consider these claims for employment. 28 U.S.C. Section 1343 requires the presence of a constitutional right. Where employment is denied or terminated, some protected interest in "liberty" or "property" rooted in the Constitution must be implicated to grant jurisdiction. *Board of Regents* v. *Roth,* supra. In the case of the new applicant, Rogers, there is no "right" to employment such as would confer jurisdiction; there is only a countervailing duty of the State not to infringe certain definable constitutional guarantees. Whatever actionable right to employment exists springs only from a constitutionally protected interest. Plaintiff Andrews, who was not rehired, has failed to allege the existence of any rules, tenure or understanding that "would justify any legitimate claim of entitlement to continued employment." *Perry* v. *Sindermann,* supra.

Both claims, if they lie, must rest on the asserted right to be free of barriers that penalize unwed parents of illegitimate children. Is such status constitutionally protected? If it is, it rests on some penumbral First Amendment right to complete liberty of procreation. True enough, certain activities relating to marriage are in this zone of

personal privacy, *Roe* v. *Wade,* 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 1409, but the Court has confined this constitutional right to sexual activity within the confines of marriage. "Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner* v. *Oklahoma,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Again, the rights growing from childbirth are ". . . the right of the individual to marry, establish a home, and bring up children." *Meyer* v. *Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1924). Plaintiffs have misread these cases and have in effect found a fundamental right to procreate outside marriage which does not exist. Where race is not a factor, states have a wide latitude in prohibiting illicit conduct, none of which could be characterized as constitutional. *McLaughlin* v. *Florida,* 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964). Thus, this suit for employment must rise or fall on the existence of constitutional protection for the activity practiced. Unless this protection is present, the state may deny a benefit to a person without recourse.

Neither this Court nor any other court has ever placed its imprimatur upon the bearing of illegitimate children. Conversely, the Court has always recognized a sovereign's justified concern and interest in the sanctity, preservation and encouragement of marriage and has repeatedly upheld the sovereign's right to enact certain laws to that end, e.g., statutes dealing with bigamy, adultery, bastardy, etc.

Marriage is the very cornerstone of western civilization, and any element which might tend to erode this foundation is and should be of serious concern to all. The Chief Justice acknowledged for the Court in *Boddie* v. *Connecticut,* 401 U.S. 371, 374, 28 L.Ed.2d 113, 91 S.Ct. 780, "the basic position of the marriage relationship in this society's hierarchy of values."

Although writing in dissent in the same case, no member of the Court disagreed with Mr. Justice Black's characterization of marriage:

> "It is not by accident that marriage and divorce have always been considered to be under state control. The institution of marriage is of peculiar importance to the people of the States. It is within the States that they live and vote and rear their children under laws passed by their elected representatives. The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain, and dissolve marriages."

As recently as January 14, 1975, the Court again recognized the state's absolute and exclusive regulatory right in the area of marriage because of its importance to the continued existence of ordered society. *Sosna* v. *Iowa*, ... U.S. ....., 42 L.Ed.2d 532, ... S.Ct. ..... [No. 73-762].

Although the Court has never condemned the issue of illicit unions, it has in the past allowed a state law to stand against a constitutional attack, which law came down hard upon the illegitimate issue rather than the parents. *Labine* v. *Vincent*, 401 U.S. 532, 28 L.Ed.2d 288, 91 S.Ct. 1017.

II.

The Writ of Certiorari should be granted since the school district rule, neutral as to sex and race, does not violate the Due Process Clause and/or Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

There is perhaps no more basic precept of law than that the enactments of a legislative body are presumed to be valid. The burden of proving them invalid is a heavy one and rests squarely upon the plaintiffs in this case.

The Court in *F.H.A.* v. *Darlington*, 358 U.S. 84, 90, 91, 3 L.Ed.2d 132, 137, 79 S.Ct. 141, in addressing itself to the constitutional validity of a section of the National Housing Act, stated:

> "If we take as our starting point what the Court said in the Sinking Fund Case, 99 U.S. 700, 718, 25 L.Ed. 496, 501—'every possible presumption is in favor of the validity of a state statute, and this continues until the contrary is shown beyond a rational doubt.'—We do not see how it can be said that the 1954 Act is unconstitutional as applied."

The presumption of constitutionality of a statute is the postulate of constitutional adjudication. *New York* v. *O'Neill*, 359 U.S. 1, 3 L.Ed.2d 585, 79 S.Ct. 564.

In *Salsburg* v. *Maryland*, 346 U.S. 545, 550, 98 L.Ed. 281, 288, 74 S.Ct. 280, the Court announced that:

> "[W]e do not sit as a super legislature or a censor. 'To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify,

if they do not require, rough accommodations—illogical, it may be, and unscientific.' " (cases cited omitted)

In *McGowan* v. *Maryland*, 366 U.S. 420, 425, 426, 6 L.Ed.2d 393, 399, 81 S.Ct. 1101, Mr. Chief Justice Warren, speaking for the Court, enunciated that:

"[A]lthough no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Mr. Justice Black, speaking for the Court in *Ferguson* v. *Skrupa*, 372 U.S. 726, 730, 10 L.Ed.2d 93, 97, 83 S.Ct. 1028, stated that "[w]e have returned to the original constitutional purpose that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Further, at 372 U.S. 732, we find the admonition that "[s]tatutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution."

The Chief Justice in his dissent in *Vlandis* v. *Kline*, 412 U.S. 441, 462, 37 L.Ed.2d 63, 77, 93 S.Ct. 2230, recognized that:

"literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be

improved on by individualized determinations so as to avoid the untoward results produced here due to the very unusual facts of this case. Both the anomaly present here and the arguable alternatives to it do not differ from those present when, for example, a State provides that a person may not be licensed to practice medicine or law unless he or she is a graduate of an accredited professional graduate school; a perfectly capable practitioner may as a consequence be barred 'permanently and irrebuttably' from pursuing his calling, without ever having an opportunity to prove his personal skills."

The rule in question serves a legitimate state interest and has a rational relationship to such interest and does not conflict with the Fourteenth Amendment to the Constitution of the United States.

The Court announced in *Adler* v. *Board of Education*, 342 U.S. 485, 493, 96 L.Ed. 517, 524, 72 S.Ct. 380, that,

"[a] teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the State has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps."

The above referred to duty and right of a school district was reaffirmed in *Beilan* v. *Board of Ed. of Phila.*, 357 U.S. 399, 2 L.Ed.2d 414, 78 S.Ct. 1317.

When the Court was again called upon to address itself to the right and duty of a state in regard to public education and the employment of teachers, admonished that "[t]here can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize." *Shelton* v. *Tucker*, 364 U.S. 479, 485, 5 L.Ed.2d 231, 235, 81 S.Ct. 247. In support of this proposition, the Court cited *Adler* v. *Board of Education*, supra. Continuing, Mr. Justice Stewart, speaking for the Court, affirmed the proposition announced in *Beilan*, supra, that there is "no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors."

Although the Court in *Pickering* v. *Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731, upheld a teacher's right to criticize the school board (a First Amendment right not present in the action sub judice) in *CSC* v. *Letter Carriers*, 413 U.S. 548, 564, 37 L.Ed.2d 796, 808, 93 S.Ct. 2880, Mr. Justice White, speaking for the majority, recognized that *Pickering* stands for the proposition that "the government has an interest in regulating the conduct" of its employees significantly different from those it possesses in connection with the citizenry in general.

Mr. Justice Powell in his concurring opinion in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 656, 39 L.Ed.2d 52, 69, 94 S.Ct. 791, recognized that

> "[s]chool boards, confronted with sensitive and widely variable problems of public education, must be accorded latitude in the operation of school systems and in the adoption of rules and regulations of general application."

We submit to the Court that the rule promulgated by the Drew Municipal Separate School District does not operate against the present moral status of an individual school teacher or teacher aide, but operates against the example which such a teacher or teacher aide provides the students in the said school district. Both the district court and the court of appeals have opted for the position that an individual who seeks employment with the defendant school district should be given a due process hearing to determine whether or not his or her status as an unwed parent of illegitimate children would materially interfere with the educational processes of the school district. We suggest to the Court that such a hearing in and of itself would cause material disruption of the said educational processes and would avail little since it is not the present moral character of the individual that is in question but the individual's role in regard to the students attending school in the defendant school district. Mr. Justice Powell in his dissenting opinion in *Goss* v. *Lopez*, ... U.S. ..... [No. 73-898], decided January 22, 1975, joined in by the Chief Justice, Mr. Justice Blackmun, and Mr. Justice Rehnquist, properly stated the role of a teacher when he stated that:

> "The role of the teacher in our society historically has been an honored and respected one, rooted in the experience of decades that has left for most of us warm memories of our teachers, especially those of the formative years of primary and secondary education."

He further acknowledged that a teacher must occupy many roles, such as "educator, adviser, friend and, at

times, parent-substitute." Although speaking in another context, Mr. Justice Powell's recognition that "[w]e have relied for generations upon the experience, good faith and dedication of those who staff our public schools" is equally applicable to the situation now before the Court.

We suggest to the Court that the rule in question does not fall within the "irrebuttable presumption" category so often condemned by this Court, such as in *Reed* v. *Reed,* 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251, and *Stanley* v. *Illinois,* 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208. As acknowledged by this Court in *Schlesinger* v. *Ballard,* ..... U.S. ....., 42 L.Ed.2d 610, 95 S.Ct. 572 [No. 73-776], decided January 15, 1975, the classification challenged in *Reed* was based upon "administrative convenience, and that alone." The rule promulgated by the Drew Municipal Separate School District is not based upon administrative convenience but, as in *Schlesinger,* serves a legitimate state interest in the field of education.

The lower courts made much to-do about the rule applying in certain cases where the unwed parent of an illegitimate child had no control over the situation which created the condition and status, e.g., childbirth incident to criminal rape. These are not the facts before the Court in this case and therefore are of no moment. The Court in *United States* v. *Raines,* 362 U.S. 17, 21, 4 L.Ed.2d 524, 529, 80 S.Ct. 519, instructs that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or situations in which its application might be unconstitutional." In the case sub judice, the plaintiffs voluntarily engaged in the illicit conduct which brought them within the ambit of the rule and, as mandated by *Raines,* cannot now be heard to champion the rights of the innocent.

CONCLUSION

We suggest to the Court that the Writ should issue since the court of appeals decided a federal question in a way which conflicts with applicable decisions of this Court. *Board of Regents* v. *Roth,* 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701, and *Perry* v. *Sindermann,* 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694. We submit to the Court that there is no right derived from or protected by the Constitution of the United States for unwed persons to bear illegitimate children. Therefore, the failure of defendants to employ instructional personnel based upon such status does not impinge upon a constitutional right.

Further, the court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, i.e., a school district's right and duty to promulgate reasonable rules in regard to employment of instructional personnel to meet special circumstances of the school district.

We further suggest to the Court that the questioned rule is constitutional and was so applied in this case. The defendant school district, faced with the grave problem of an alarming rate of increase as to illegitimate births among its students, properly applied a rule which had been formulated based upon the distilled wisdom of educators and others possessing expertise in this field. It is beyond cavil that teachers and teacher aides who have wilfully committed certain illicit acts, which acts have placed them into the status of unwed parents of illegitimate children, cannot function properly in their role as "educator, adviser, friend and, at times, parent-substitute." It is self-evident that such persons regardless of their present state of morality cannot serve as a proper "role model" for the children attending school in the Drew Municipal Separate School District. Again, we emphasize that the rule does

not concern itself with the present status of morality of an individual but serves the office of protecting the students from being subjected to improper "role models" in their educational training. The Court is on judicial record that in certain areas of human involvement, appearance is sometimes exalted over substance. The Court with Mr. Justice Marshall as its organ announced that:

> "Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the *appearance* of bias." *Peters* v. *Kiff*, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163. (Emphasis added)

If appearances rise to the dignity of constitutional recognition when an adult voluntarily or by fortune is placed in circumstances which may dictate his or her future for a finite period, can it be gainsaid that appearances (role models) are of even greater importance in circumstances of an individual during his or her formative years which dictate their entire future? Where lies the difference? If there be any, it is for the Court to say. Let the Writ issue.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

Katie Mae ANDREWS and Lestine Rogers, Plaintiffs-Appellants-Cross-Appellees,

v.

The DREW MUNICIPAL SEPARATE SCHOOL DISTRICT et al., Defendants-Appellees-Cross-Appellants.

No. 73-3177.

United States Court of Appeals, Fifth Circuit.

Feb. 3, 1975.

Two unwed mothers brought an action under federal civil rights statutes to have declared unconstitutional a rule of a school district under which unwed parents were ineligible to be hired as teachers' aides. The United States District Court for the Northern District of Mississippi, at Greenville, 371 F.Supp. 27, William C. Keady, Chief Judge, declared the rule unconstitutional but refused to award plaintiffs attorneys' fees, and cross appeals were filed. The Court of Appeals, Simpson, Circuit Judge, held that the rule had no rational relation to the objectives ostensibly sought to be achieved by school officials and that it was fraught with invidious discrimination and thus constitutionally defective both as a denial of equal protection and of due process.

Affirmed.

1. Constitutional Law (Key) 253(1)

Due process interdicts adoption by state of irrebuttable presumption as to which presumed fact does not necessarily follow from proven fact. U.S.C.A.Const. Amend. 14.

2. Constitutional Law (Key) 253(1)

If state investigates moral character of individual upon whom it intends either to bestow benefit or impose burden, due process requires that such inquiry look to present moral character. U.S.C.A.Const. Amend. 14.

3. Constitutional Law (Key) 253(2)

School district's rule under which present immorality was irrebuttably presumed from proven fact of unwed parenthood denies due process of law. U.S.C.A.Const. Amend. 14.

4. Constitutional Law (Key) 211

Where school district, by rule of its superintendent, refused to hire or retain teachers who were unwed mothers, policy denied unwed parents equal protection of laws by creating irrational classification under which such unwed mothers were denied public hearing to which all other teachers charged with immoral conduct were entitled. 28 U.S.CA. §§ 1343, 2201, 2202; 42 U.S.C.A. §§ 1981, 1983 et seq.; Code Miss.1942, § 6282—26; U.S.C.A.Const. Amends. 5, 14.

5. Constitutional Law (Key) 211, 253(2)

Insofar as rule under which school district refused to consider unwed mothers for hiring inextricably bound unwed parental status to irredeemable immorality, it violated both due process and equal protection of laws. U.S.C.A. Const. Amends. 5, 14.

6. Schools and School Districts (Key) 63(1)

School district's practice of refusing employment to unwed mothers was not justified on ground that it was necessary in order to create properly moral scholastic environment, because unwed parents are improper communal models after whom students might pattern their lives, or because presence of unwed parents in scholastic environment would materially contribute to school girl pregnancies.

7. Civil Rights (Key) 13.17

Where, in action by unwed mothers under federal civil rights acts challenging constitutionality of school district's rule prohibiting employment of persons with illegitimate children, plaintiffs alleged no violation of equal employment opportunity provisions of Civil Rights Act of 1964, trial court did not err in refusing to award plaintiffs attorneys' fees even though they were prevailing parties. 28 U.S.C.A. § 1343; 42 U.S.C.A. §§ 1981, 1983; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

Charles Victor McTeer, Greenville, Miss., Johnnie E. Walls, Jr., Willie L. Bailey, Greenwood, Miss., Lewis Myers, Jr., Oxford, Miss., Catherine P. Mitchell, Mound Bayou, Miss., for plaintiffs-appellants-cross-appellees.

Nancy Stearns, New York City, for Center for Constitutional Rights, amicus curiae.

A. F. Summer, Atty. Gen., Wm. A. Allain, 1st Asst. Atty. Gen., Heber Ladner, Jr., Jackson, Miss., Champ T. Terney, Jr., Indianola, Miss., for defendants-appellees-cross-appellants.

Linda Colvard Dorian, Wm. A. Carey, Gen. Counsel, Julia P. Cooper, Asst. Gen. Counsel, Washington, D. C., for Equal Employ.

Appeals from the United States District Court for the Northern District of Mississippi.

Before BELL, SIMPSON and INGRAHAM, Circuit Judges.

SIMPSON, Circuit Judge:

This suit attacking the validity of the Drew Municipal School District's rule against employing parents of illegitimate children was initiated by two such parents, both mothers, against whom the rule militated. Named as defendants were the Drew Municipal School District (the District), George Ferris Pettey, its Superintendent, and the individual members of the District's Board of Trustees (the Board).

The complaint sought declaratory and injunctive relief to "redress the deprivation of rights and privileges and immunities of the plaintiffs guaranteed by the (sic) 42 U.S.C. 1981, 1983 et seq., Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d et seq.,[1] the Fifth and

1. In paragraphs 11, 12 and 13 of the complaint, the plaintiffs detailed their claims of violations of their rights under the heading "VIOLATIONS OF LAW". The refusal by the defendants to employ plaintiff Andrews and the termination of the plaintiff Rogers was asserted to delegate the plaintiffs into an unconstitutionally created classification based upon their race, sex and unmarried parent status in violation of the constitutional and statutory provisions enumerated in the text, including Title VI of the Civil Rights Act of 1964, 42 U.S.C., Section 2000d. It was further alleged that Andrews was refused employment because of her race, sex and single parent status and that Rogers was discharged from her teachers' aide position because of her race, sex and single parent status, all in violation of the same constitutional and statutory provisions.

The district court's decision, Andrews v. Drew Municipal Separate School District, N.D.Miss.1973, 373 F.Supp. 27, contains no findings or conclusions with respect to violation of Title VI of the Civil Rights Act, Title 42, U.S.C., Sec. 2000d.

The complaint contained no assertion that Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunities provision, Title 42, U.S.C. § 2000e et seq., was violated. No assertion of any violation of Title VII was made during the district court proceedings, and the district judge made no findings or conclusions as to violations of Title VII.

Fourteenth Amendments to the United States Constitution. Plaintiffs further asked for declaratory relief under 28 U.S.C. Section 2201, 2202. Jurisdiction was invoked under Title 28 U.S.C. Section 1343.

Following a series of hearings the district court decided the case on the merits, holding that the rule violated both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. Andrews v. Drew Municipal Separate School District, N.D.Miss.1973, 371 F.Supp. 27. We affirm for reasons stated below.

In the Spring of 1972, Superintendent Pettey learned that there were some teacher aides presently employed in the District who were parents of illegitimate children. Disturbed by this knowledge, Pettey immediately implemented an unwritten edict to the effect that parenthood of an illegitimate child would automatically disqualify an individual, whether incumbent or applicant, from employment with the school system.[2] There is no doubt that the policy is attributable solely to Pettey; there was no evidence that he sought either the prior advice or the consent of the Board.[3]

Mrs. Fred McCorkle is one of the administrators responsible for implementing the unwed parent policy. As Coordinator of Elementary Instruction for the school district, she is in charge of the teacher aide program and

2. Pettey in testimony indicated confusion as to the expanse of the policy he had promulgated. He was positive that the rule should apply to all instructional personnel. Upon questioning, he expanded the list to include not only teachers and teacher aides, but also secretaries, librarians, dieticians, cafeteria operators, nurses, social workers, school principals, school volunteers and even PTA presidents. Although he was not positive, he did not think the rule should apply to bus drivers, janitors or maids.

3. The Board and its individual members were unaware of the rule until the commencement of this action. The evidence indicates, however, that the Board then ratified the policy and all actions taken under it.

recommends to Pettey who shall be hired to fill teacher aide vacancies. All potential teacher aides must submit an application to Mrs. McCorkle who then interviews them and investigates their applications. The investigation consists of consultations with other administrative staff members as well as the principals of the various schools concerning their knowledge of the applicant.

Both plaintiffs-appellees, Lestine Rogers and Katie Mae Andrews, were victims of the unwed parent policy. Lestine Rogers was hired as a teacher aide in the Fall preceding the initiation of the rule, although her application stated that she was single and had a child. After the Pettey policy rule was announced, Mrs. McCorkle informed Ms. Rogers that because she was the parent of an illegitimate child, she would not be re-hired for the following year. Katie Mae Andrews, on the other hand, knew about the Pettey rule prior to applying for a teacher aide position. Although she too was the mother of an illegitimate child, she did not so indicate on her application. Mrs. McCorkle learned of Ms. Andrews' illegitimate child in the course of her investigation of the application. She made a written notation of her finding on the application,[4] and refused to consider Ms. Andrews further.

From the beginning, unwed mothers only, not unwed fathers, were adversely affected by the rule. This factor coupled with the conclusion that the policy, by its nature,

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4. Across the top front of Ms. Andrews' application, Mrs. McCorkle wrote, "Single with a child 3 or 4." On the back of the application, Mrs. McCorkle wrote:

> "This applicant would have been hired in January 1973 if I had not received information from Mrs. Clara Robinson and others at James Elementary that she had a child. The applicant stated on her application that she was single and had no children. When she called by phone in January I informed her of the school policy and have had no contact with this applicant since then."

could only be applied against females, led the district court to hold alternatively that "assuming a rational relation does exist between the Drew policy and legitimate educational objectives, the rule creates an inherently suspect classification based on sex, i. e. single women, which cannot survive strict scrutiny mandated by the Fourteenth Amendment." 371 F.Supp. at 35. The district court's primary holding was that the rule "has no rational relation to the objectives ostensibly sought to be achieved by the school officials and is fraught with invidious discrimination; thus it is constitutionally defective under the traditional, and most lenient, standard of equal protection and violative of due process as well." Ibid. at 31. Thus this appeal concerns a policy or rule that has not only been held to violate equal protection for alternative reasons, but has also been held to violate due process. On the basis relied upon by the district court of traditional notions of equal protection, because the policy created an irrational classification, we affirm.[5]

"Traditional" equal protection analysis requires that legislative classifications must be sustained as long as the classification itself is rationally related to a legitimate governmental interest. United States Department of Agriculture v. Moreno, 1973, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782; Jefferson v. Hackney, 1972, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285; Weber v. Aetna Casualty & Surety Co., 1972, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768. To find the governmental objective ostensibly served by the rule, we turn to the testimony of Superintendent Pettey, the rule's originator and explicator. Pettey's

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5. Because we affirm upon traditional equal protection grounds, we do not consider the district court's alternative finding of a sex based classification or its legal conclusion that such classifications are inherently suspect.

avowed objective was to create a scholastic environment which was conducive to the moral development as well as the intellectual development of the students. Certainly this objective is not without legitimacy. See Shelton v. Tucker, 1960, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231; Adler v. Board of Education, 1952, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517. Schools have the right, if not the duty, to create a properly moral scholastic environment. See Beilan v. Board of Education, 1958, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414. But the issue is not simply whether the objective itself is legitimate, but rather whether the Pettey rule "advances that objective in a manner consistent with the Equal Protection Clause," Reed v. Reed, 1971, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225. We hold that it does not.

The District offers three possible rationales through which it asserts that its rule under attack furthers the creation of a properly moral scholastic environment: (1) unwed parenthood is prima facie proof of immorality; (2) unwed parents are improper communal role models, after whom students may pattern their lives; (3) employment of an unwed parent in a scholastic environment materially contributes to the problem of school-girl pregnancies.

[1-3] The first of these postulates violates not only the Equal Protection Clause, but the Due Process Clause as well. The law is clear that due process interdicts the adoption by a state of an irrebuttable presumption, as to which the presumed fact does not necessarily follow from the proven fact. See Cleveland Board of Education v. LaFleur, 1974, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52; Vlandis v. Kline, 1973, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63; Stanley v. Illinois, 1972, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551. Thus, unless the presumed fact here, present

immorality,[6] necessarily follows from the proven fact, unwed parenthood, the conclusiveness inherent in the Pettey rule[7] must be held to violate due process. We agree with the district court that the one does not necessarily follow the other:

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6. If a state investigates the moral character of an individual upon whom it intends either to bestow a benefit or to impose a burden, due process requires that such inquiry look to present moral character. Thus, in Schware v. Board of Bar Examiners of New Mexico, 1957, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796, the Supreme Court held that the New Mexico Board of Bar Examiners violated an applicant's due process rights by refusing to consider his evidence of present good moral character in disallowing him membership to the bar. The Board relied instead on negative inferences drawn from Schware's past, in that approximately fifteen years prior to entering law school, he was a member of the Communist party, made use of aliases and had an arrest record. In reversing the Board's denial of admission, the Court noted that "if (Schware) otherwise qualifies for the practice of law and is admitted to the bar, the State has ample means to discipline him for any future misconduct." 353 U.S. at 247, n. 20, 77 S.Ct. at 760, n. 20.

7. The conclusiveness of the Pettey rule was testified to by Superintendent Pettey himself:

> Q. So I take it, Mr. Pettey, that a person who supposedly has a, quote, illegitimate child, as you put it, that fact, no matter when it took place or no matter under what circumstances it took place, is prima facie evidence of a lack of morality:
>
> A. It would be to me, yes.
>
> * * *
>
> THE COURT: Mr. Pettey, you do not think the facts or circumstances under which an illegitimate birth occurred is at all relevant to the issue of good character or bad character?
>
> A. No. sir. That would be hard to get at. I think the fact that the birth occurred without the benefit of matrimony is, to me, proof enough of the . . .
>
> THE COURT: Is conclusive?
>
> A. Yes sir.
>
> * * *
>
> THE COURT: . . . Suppose a woman had an illegitimate child and then later married either the father of the child or another man. When she presented herself to you she showed she was married and had a child, one child. Would you consider her for employment?
>
> A. No, sir, I would not.

By the rule, a parent, whether male or female, who has had such a child, would be forever precluded from employment. Thus no consideration would be given to the subsequent marriage of the parent or to the length of time elapsed since the illegitimate birth, or to a person's reputation for good character in the community. A person could live an impeccable life, yet be barred as unfit for employment for an event, whether the result of indiscretion or not, occurring at any time in the past. But human experience refutes the dogmatic attitude inherent in such a policy against unwed parents. Can it be said that an engaged woman, who has premarital sex, becomes pregnant, and whose fiance dies or is killed prior to their marriage, is morally depraved for bearing the posthumous child? The rule allows no compassion for the person who has been unwittingly subjected to sexual relations through force, deceptive design or while under the influence of drugs or alcohol, yet chooses to have the child rather than to abort it. The rule makes no distinction between the sexual neophyte and the libertine. In short, the rule leaves no consideration for the multitudinous circumstances under which illegitimate childbirth may occur and which may have little, if any, bearing on the parent's present moral worth. A past biological event like childbirth out of wedlock, even if relevant to the issue, may not be controlling; and that it may be considered more conventional or circumspect for the infant to be surrendered to others for upbringing rather than be reared by the natural parent is hardly determinative of the matter. Furthermore, the policy, if based on moral judgment, has inherent if unintended defects or shortcomings. While obviously aimed at discouraging prematerial (sic) sex relations, the policy's effect is apt to encourage abortion, which is itself staunchly opposed by some on ethical or moral grounds. It totally ignores, as a disqualification, the occurrence of

extra-marital sex activity, though thought of by many as a more serious basis for moral culpability. Indeed, the superintendent's fiat, altogether unsupported by sociological data, equates the single fact of illegitimate birth with irredeemable moral disease. Such a presumption is not only patently absurd, it is mischievous and prejudicial, requiring those who administer the policy to "investigate" the parental status of school employees and prospective applicants. Where no stigma may have existed before, such inquisitions by overzealous officialdom can rapidly create it. 371 F.Supp. at 33-34 (footnotes deleted).

[4, 5] We observe also that there are reasonable alternative means through which to remove or suspend teachers engaging in immoral conduct; means that guarantee the teacher a public hearing on the merits and right of appeal. 5 Miss.Code Sec. 6282-26 (1971 Supp.).[8] By denying a public hearing to which all other teachers charged with immoral conduct are entitled, the policy denies unwed parents equal protection of the laws. Insofar as the rule inextricably binds unwed parental status to irredeemable immorality, it violates both due process and equal protection.

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8. Sec. 6282-26 reads, in pertinent part:

Suspension of superintendent, principal, or teacher—notice—appeal.—For incompetence, neglect of duty, immoral conduct, intemperance, brutal treatment of a pupil or other good cause the county superintendent of education or superintendent of the municipal separate school district, as the case may be, may remove or suspend any . . . teacher in any school district, but before being so removed or suspended the . . . teacher shall be notified of the charges against him and he shall be advised that he is entitled to a public hearing upon said charges at a date to be fixed in such notice. . . . From the decision made at said hearing the . . . teacher shall be allowed an appeal to the state board of education . . . . Any party aggrieved by the said ruling of the state board of education may effect an appeal therefrom to the cancery court . . . .

[6] The school district urges a second rationale for its rule based upon the holding in McConnell v. Anderson, 8 Cir. 1971, 451 F.2d 193:

> "What the school board looks at is whether, moral considerations aside, proper educational growth can be furthered and respect for marriage ingrained by employing unwed parents. The question then becomes whether the open and notorious existence of the status as an unwed parent would injure the affected students." Reply Brief of Defendants/Appellants, p. 5.

McConnell, a male homosexual, had been offered a position at the University of Minnesota pending approval of the Board of Regents. While Board action was pending, McConnell and a male friend attempted to obtain a marriage license, an event which generated at least four local newspaper articles as well as local radio and television news coverage. Following this action the Board disapproved McConnell's appointment with the statement that his "personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."[9] 451 F.2d at 194. In upholding the Board of Regents' decision, the Eighth Circuit specified that McConnell was not denied employment because of his homosexual tendencies or his desire to continue homosexual conduct clandestinely, but rather because of his "activist role in implementing his unconventional ideas concerning the societal status to be accorded homosexuals," which would have had the effect of forcing "tacit approval of this

9. We think it significant also that upon request, McConnell was given an opportunity to appear before the Board of Regents with counsel to present information claimed to support his application. It was only after this hearing that the Regents adopted the resolution to disapprove the appointment.

socially repugnant concept" upon the University. 451 F.2d at 196.

We do not consider *McConnell* supportive of the District's position. The record before us contains no evidence of proselytizing of pupils by the plaintiffs and reveals instead that each plaintiff, along with her illegitimate offspring, is living under the same roof as her parents, brothers and sisters. It would be a wise child indeed who could infer knowledge of either plaintiff's unwed parent status based on the manner of plaintiffs' existence. As the district court observed:

> "In the absence of overt, positive stimuli to which children can relate, we are convinced that the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative. We are not at all persuaded by defendants' suggestions, quite implausible in our view, that students are apt to seek out knowledge of the personal and private family life-styles of teachers or other adults within a school system (i. e. whether they are divorced, separated, happily married or single, etc.), and, when known, will approve of and seek to emulate them." 371 F.Supp. at 35.

In our view then, the school district's second offered justification for the unwed parent policy also falls short of equal protection requirements.

The third rationale proffered by the school district in hopes of salvaging the Pettey rule, that the presence of unwed parents in a scholastic environment materially contributes to school-girl pregnancies is without support, other than speculation and assertions of opinion, in the record before us.

Because we hold that the Board rule under attack violated traditional concepts of equal protection, we find it unnecessary to discuss numerous other issues urged on appeal by appellees or in their behalf by *amici curiae;* for example, whether the rule creates a suspect classification based upon race or sex, or whether it infringes upon some constitutionally protected interest such as the right to privacy or the right to procreation.[10]

[7] Finally we find insufficient justification to reverse on cross-appeal the district court's denial of attorney fees.[11]

Affirmed.

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10. Both the Equal Employment Opportunity Commission and the Center for Constitutional Rights filed *Amicus Curiae* briefs before this court urging that the basis for our decision be broadened to include some or all of these issues. Both Amici sought and were denied leave to participate in oral argument.

11. Despite his alternative ground of decision, discrimination as to sex in violation of the Fourteenth Amendment, the district judge denied the award of attorneys' fees in a separate order entered after his injunctive and declaratory decree. No reasons were assigned. Because of the strong congressional policy against unlawful discrimination in employment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e; Weeks v. Southern Bell Tel. & Tel. Co., 5 Cir. 1969, 408 F.2d 228, we would seriously consider reversal for failure to award attorneys' fees, if we could base our affirmance on that congressional policy's proper vindication. See Clark et al. v. American Marine Corporation, 5 Cir. 1971, 437 F.2d 959, affirming per curiam, Clark et al. v. American Marine Corporation, E.D.La. 1970, 320 F.Supp. 709; cf. Newman v. Piggie Park Enterprises, 1968, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263. But review of the finding of discrimination as to sex, especially since no Title VII violation was asserted by the pleadings or dealt with by the trial court (Note 1, supra) presents a thicket we deem it unwise to enter. In the procedural posture which has evolved, we perceive no error in the refusal to award attorneys' fees.

APPENDIX "B"

Katie Mae ANDREWS and Lestine Rogers, Plaintiffs,

v.

The DREW MUNICIPAL SEPARATE SCHOOL DISTRICT et al., Defendants.

No. GC 73-20-K.

United States District Court, N. D. Mississippi, Greenville Division.

July 3, 1973.

Civil rights action brought against school district, its trustees and superintendent, seeking declaratory and injunctive relief to redress alleged deprivation of rights and privileges guaranteed by Fourteenth Amendment. The District Court, Keady, Chief Judge, held that policy of barring an otherwise qualified person from being employed, or considered for employment, in public schools merely because of person's previously having had an illegitimate child had no rational relation to objectives ostensibly sought to be achieved by school officials and was constitutionally defective as denying equal protection, violating due process and constituting impermissible discriminatory classification based upon sex, and that discharge of one teacher's aide and refusal to employ an applicant for the same position, without any inquiry into their good moral character, but solely because they they were unwed mothers was improper.

Judgment for plaintiffs.

1. Schools and School Districts (Key) 63(1), 133

Public school officials have authority to adopt reasonable employee qualification criteria, including possession of good character traits, applicable to administrators, teachers, staff and public school employees generally.

2. Schools and School Districts (Key) 63(1)

Subject to constitutional and statutory limitations, school officials are to be afforded leeway in imposing employee qualifications to suit particular needs of school or school districts involved.

3. Schools and School Districts (Key) 63(1)

No school administrator or board should be precluded from denying employment to anyone determined to be of bad moral character upon fair and unbiased consideration of pertinent information.

4. Civil Rights (Key) 9.14
Constitutional Law (Key) 224, 275(1)

Policy of barring an otherwise qualified person from being employed, or considered for employment, in public schools merely because of person's previously having had an illegitimate child had no rational relation to objectives ostensibly sought to be achieved by school officials and was constitutionally defective as denying equal protection, violating due process and constituting impermissible discriminatory classification based upon sex. U.S.C.A.Const. Amend. 14; 28 U.S.C.A. § 1343; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; 42 U.S.C.A. §§ 1981, 1983.

5. Constitutional Law (Key) 211, 275(1)

State cannot exclude person from profession or occupation in manner or for reasons that contravene due process clause or equal protection clause. U.S.C.A.Const. Amend. 14.

6. Constitutional Law (Key) 277(2)

Discharge of teacher's aide and refusal to consider woman for employment as such solely because they were unwed parents denied them due process rights. U.S.C.A. Const. Amend. 14.

7. Schools and School Districts (Key) 133

Exclusion of unwed parents from employment in school district was not justified on theory that their mere presence in educational environment might adversely affect morals of school children and enhance likelihood of schoolgirl pregnancies, in absence of evidence that unwed mother who had been discharged from her position as teacher's aide or unwed mother who had been refused employment or other unwed mothers had been attempting or would have attempted to proselytize students. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; 42 U.S.C.A. §§ 1981, 1983.

8. Schools and School Districts (Key) 63(1), 133

In absence of showing of proselytization, policy of excluding unwed parents from employment by school district was not justified on theory that it was imperative for teachers and other school employees to project a "proper" image to students of impressionable age and that students were apt to seek out knowledge of personal and private family life-styles of teachers or other adults within school

system and, when known, would approve of and seek to emulate them. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; 42 U.S.C.A. §§ 1981, 1983.

9. Constitutional Law (Key) 238(1)
Schools and School Districts (Key) 63(1)

School district's policy of not hiring unwed parents was not justified on basis that it permissibly sought to regulate a "status" situation, inasmuch as "parental status" as a basis of classification was no less offensive to Fourteenth Amendment than other classifications arbitrarily and unreasonably made by or on behalf of the state. U.S.C.A.Const. Amend. 14.

10. Constitutional Law (Key) 208(3)

Where state has adopted a suspect classification like sex, it bears a heavy burden of justification. U.S.C.A.Const. Amend. 14.

Charles Victor McTeer, Mound Bayou, Miss., for plaintiffs.

Champ T. Terney, Indianola, Miss., for defendants.

MEMORANDUM OPINION

KEADY, Chief Judge.

This civil rights action brought against Drew Municipal Separate School District, its Trustees and Superintendent, seeks declaratory and injunctive relief to redress alleged deprivation of rights and privileges guaranteed by the Fourteenth Amendment to the Constitution, 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.). Jurisdiction is invoked pursuant to 28 U.S.C. § 1343.

The complaint alleges that plaintiffs, Katie Mae Andrews and Lestine Rogers, both of whom are black females qualified to be employed as teachers' aides in the Drew public schools, were wrongfully denied employment because of a local policy which forbids employment of school personnel who are unwed parents. Plaintiffs contend that this policy or practice, which was promulgated and implemented by defendants, is violative of equal protection because it creates an unconstitutional classification to both race and sex. In addition, plaintiffs urge that the rule impermissibly impinges on their constitutional right to privacy.

Defendants steadfastly defend the reasonableness and necessity of the rule and insist that it applies equally to black and white, male and female.

The parties have presented evidence at extensive hearings[1] and by depositions, and supplied the court with excellent briefs, including those by participating amici,[2] on the legal issues presented. The case is now ripe for final determination on its merits. The relevant facts are disclosed by a brief review of the evidence.

Although the circumstances surrounding the denial of employment to Ms. Andrews and Ms. Rogers arise from

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1. Subsequent to the filing of the complaint, plaintiffs moved for a preliminary injunction. An evidentiary hearing was held on March 16, 19 and 20, at the conclusion of which the court took the matter of preliminary relief under advisement, allowing the parties to submit briefs in support of their respective positions. The court, by order dated May 10, 1973, concluded that the issues had been substantially developed to enable to the court to dispose of the case on its merits after affording the parties a final opportunity to submit any additional evidence not previously presented. A final hearing was held on May 31, 1973.

2. Upon the motions of the Center for Constitutional Rights and the Equal Employment Opportunity Commission each was allowed to participate as amicus curiae and submit legal memoranda.

different factual settings (Ms. Andrews applied for a position as a teacher's aide and was never hired, while Ms. Rogers, though hired, was subsequently discharged), both plaintiffs were casualties of an unwritten edict issued in May 1972 by Superintendent Pettey to Ms. Fred McCorkle, the director of the teachers' aide program. Pettey had been informed by the Title I coordinator that the school district was employing several teachers' aides who were parents of "illegitimate" children. Disturbed by this report, the superintendent instructed Ms. McCorkle and other administrative personnel that contracts of employees in that category would not be renewed at the end of the current school year (1971-72), and parentage of an illegitimate child would henceforth disqualify prospective applicants from consideration for employment.[3]

When the superintendent's policy became effective in the spring semester of the 1971-72 school year, Ms. Rogers was then employed as a teacher's aide in the elementary school.[4] In August 1971, prior to her employment and in accordance with standard requirements, Ms. Rogers, a high school graduate, had filed an employment application, which was reviewed by Ms. McCorkle. Finding her

3. The complaint refers to the policy as precluding the employment of "unwed parents"; and although there was some conflicting testimony as to the scope of the rule as it was interpreted from Pettey's instructions, the evidence indicates that the policy was directed solely to employees who were parents of illegitimate children. The rule would not literally apply to *all* unwed parents (which presumably would include divorced parents, a parent whose spouse is deceased, or a single parent with an adopted child). However, the rule would be nonetheless applicable to a parent who, though presently married, entered matrimony only after begetting an illegitimate child.

4. As of the March 16 hearing, there were 33 teachers' aides employed in the Drew schools. Aides are normally hired on a year-to-year basis. Their primary responsibilities are to assist the elementary school teachers in directing activities in the classroom and supervising school children during recess periods.

qualified, Ms. McCorkle recommended the applicant for employment as an aide. Ms. Rogers was granted a year's contract, at a salary of $250 per month. On her employment application, Ms. Rogers had plainly indicated that her marital status was "single" and that she had one child.[5] This disclosure, though known to Ms. McCorkle, did not immediately hinder plaintiff's prospects for continued employment. Upon receiving the superintendent's instructions, however, Ms. McCorkle promptly notified Ms. Rogers and two other teachers' aides suspected of having illegitimate children that they would not be rehired for the succeding school year.[6]

Ms. Andrews, a college graduate certified to teach school in Mississippi, on December 18, 1972, applied to Ms. McCorkle for employment as a teacher's aide. A vacancy in this position for the ensuing spring semester existed when Ms. Andrews applied. The application which Ms. Andrews filled out in Ms. McCorkle's presence contained inquiries as to the applicant's marital status, to which plaintiff checked "single", and number of children, to which plaintiff responded "0". On the face of the application there was nothing to indicate that employment of Ms. Andrews would be contrary to the policy. To assure full compliance with Pettey's instructions, Ms. McCorkle routinely "investigated" the parentage status of

5. Unquestionably, plaintiff Rogers had one illegitimate child when she submitted her employment application in August 1971. Since her dismissal, Ms. Rogers has remained unmarried yet has given birth to a second child. Ms. Rogers and her children currently reside with her parents who aid in the care and support of their daughter and grandchildren.

6. Violet Burnett and Rosie Dean Mays, both of whom were also black female teachers' aides, were notified that their contracts would not be renewed because of the policy against unwed parents. Although Violet Burnett appeared as a witness, neither former school employee is a plaintiff in the present action.

applicants, in the course of which she learned that Ms. Andrews was the parent of an illegitimate child.[7] Upon receiving this information, Ms. McCorkle wrote on the Andrews' application, "single with a child 3 or 4 [years of age]", and did not further consider her for employment. In January 1973, Ms. McCorkle notified Ms. Andrews that she could not be considered for the position of teacher's aide because she was unwed parent. Ms. McCorkle then recorded a summary of her actions on the reverse side of the application as follows: "This applicant would have been hired in January 1973 if I had not received information from Mrs. Clara Robinson and others at James Elementary that she had a child. The applicant stated on her application that she was single and had no children, when she called by phone in January I informed her of the school policy and have had no contact with this applicant since then." Had Ms. Andrews been employed, her qualifications as a college graduate and holder of a certificate to teach in Mississippi's public schools would entitle her to a contract providing for a monthly salary of $450.

The challenged rule was without question the brainchild of Superintendent Pettey arising from long-held personal convictions concerning morality of school employees; and, should the occasion arise, the rule was not to be limited to teachers' aides or teachers, but equally applicable to any school employee having direct contact with

7. At the hearing, plaintiff Andrews frankly admitted that, though never married, she is the mother of a four-year old child. Plaintiff explained that she was reluctant to disclose this fact on her application because she knew that such a disclosure would preclude her employment under the superintendent's policy. Plaintiff and her child reside in Drew with plaintiff's mother, sister and two brothers.

students.[8] Pettey had not discussed the rule with the principals, teachers or school administrative personnel prior to its implementation. Nor had he obtained the prior approval of the Board of Trustees; indeed, the Board was first informed of the rule when the present action was commenced. The evidence shows, however, that the Board has since ratified the policy and the action taken against plaintiffs and other employees pursuant thereto. No white person has been found to be an unwed parent, and denied employment because of the stated policy.

According to Pettey, school personnel should be charged with the responsibility for the moral as well as the intellectual development of the enrolled students. Thus, the rationale of the rule was founded upon a considered opinion that: (1) the bearing of an illegitimate child, no matter when it took place, or under what circumstances, is conclusive proof of the parent's immorality or bad moral character, and therefore is a proper basis for precluding the employment of such persons in an educational environment, the need of a proper teacher model being regarded of especial value to "minority disadvantaged children"; and (2) the employment of a parent of an illegitimate child for instructional purposes materially contributes to the problem of schoolgirl pregnancies. The Drew public schools, which were desegregated by order of this court rendered May 28, 1969, in civil action GC 6731-S, are fully integrated as to faculty, staff and students. Of the

8. In February 1973 Betty Barnes, a black female who was a college graduate and occasionally employed as a substitute teacher at Hunter Junior High School, was notified by her principal that she could no longer teach because of the superintendent's policy. Ms. Barnes, at time of the hearing, was the unwed parent of a child seven months of age. Pettey testified that his mandate would likewise apply to secretaries, cafeteria workers and librarians; he was not certain as to the rule's applicability to bus drivers, maids, or school janitors.

total student enrollment of 1200, 80% are black, 20% are white. There are 28 schoolgirl pregnancies reported in the 1971-72 school year, and 13 in the current year.

Plaintiffs' principal argument is that a rule which classifies parents who are unwed differently from other persons, in the context of requirements imposed for employment in public schools, is violative of the Equal Protection Clause of the Fourteenth Amendment, whether the policy is judged by the traditional rational standard of review or by strict scrutiny required in the case of suspect classifications of sex and race. Another proposition advanced on behalf of plaintiffs is that the bearing of children is a matter of privacy which falls within the penumbra of personal rights protected by the Ninth and Fourteenth Amendments. Defendants deny that the policy, either facially or as applied, creates classifications based on sex or race, and assert that the rule passes constitutional muster as being reasonably related to educational purposes sought to be effectuated by them, and that this is accomplished without trespassing upon any right of privacy recognized by the Constitution.

The case is one of first impression. As indicated by briefs of counsel and from the court's own research, no court has ever been called upon to consider a rule or regulation of the character as the one promulgated for the Drew schools. During our evidentiary hearing, educational and psychological experts have presented differing views, mainly of a judgmental nature unsupported by any studies that provide a solid factual basis for their conclusions. These professional opinions, when simplified, rest either on the notion that an unwed parent is not likely to be a proper example for students, or, on the contrary view, that such parentage has absolutely no relationship

to the function and role of teachers or other employees in a public school system.

[1-4] This court readily recognizes that public school officials have the undoubted authority to adopt reasonable employee qualification criteria (including the possession of good character traits) applicable to administrators, teachers, staff and public school employees generally. It is also acknowledged that, subject to constitutional and statutory limitations, school officials are to be afforded leeway in imposing employee qualifications to suit the particular needs of the school or school district involved. Certainly, no school administrator or board should be precluded from denying employment to any one determined to be of bad moral character upon a fair and unbiased consideration of pertinent information, and we do not make the slightest intimation otherwise.[8a] After a careful review of Drew's policy and the relevant evidence, however, we hold that the policy or practice of barring an otherwise qualified person from being employed, or considered for employment, in the public schools merely because of one's previously having had an illegitimate child has no rational relation to the objectives ostensibly sought to be achieved by the school officials and is fraught with invidious discrimination; thus, it is constitutionally defective under the traditional, and most lenient, standard of equal protection and violative of due process as well. Alternatively, the policy, both inherently and as applied, constitutes an impermissible, discriminatory classification based upon sex. We find it unnecessary to reach the issues of race and privacy raised in argument.

8a. By Miss.Code § 37-9-59, a school superintendent is empowered to remove or suspend a teacher "*for immoral conduct* or other good cause" after the teacher is given written notice of the charges, and is afforded an opportunity for a public hearing. (Emphasis added).

In an unbroken line of decisions, the United States Supreme Court has consistently applied the Equal Protection Clause to strike down statutes, regulations, and rules of a state found to be unconstitutional because of arbitrary and irrational classifications. The traditional standard of review was clearly and succinctly summarized in Rinaldi v. Yeager, 384 U.S. 305, 308-309, 86 S.Ct. 1497, 1499, 16 L.Ed.2d 577, 580 (1966) in these words:

> "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. * * * It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The Constitution does not require things which are different in fact * * * to be treated in law as though they were the same.' * * * Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'"

Only recently, the Supreme Court applying the traditional standard of equal protection review in Reed v. Reed, 404 U.S. 71, 75, 92 S.Ct. 251, 254, 30 L.Ed.2d 225, 229 (1971), invalidated an Idaho statute that preferred a male over a female applicant of the same class in the appointment as administrator of a decedent's estate. Chief Justice Burger, writing for a unanimous court, reaffirmed that:

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object

> of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989, 990 (1920)."

[5] It is also a well-settled constitutional principle that a state cannot exclude a person from a profession or occupation in a manner or for reasons that contravene the Due Process Clause or the Equal Protection Clause. Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). *Schware* may be regarded as a prominent landmark in this field since the case dealt with a state's requirements for admission to practice law, a profession affected with as much, if not more, public interest than teaching school, and one long subject to statutory regulation. In *Schware*, the Court reversed a decision that a bar applicant in New Mexico should not be permitted to take the bar examination in view of his past membership in the Communist Party, his use of aliases and his record of arrests. With respect to the demands of equal protection, the Court held:

> "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, *but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.*" 353 U.S. at 239, 77 S.Ct. at 756 (Emphasis added).

The Court held that the refusal of the New Mexico Board of Bar Examiners to consider evidence of the applicant's present good character and its reliance solely upon inferences drawn from conduct which occurred many years before violated the Fourteenth Amendment, and was offensive to both equal protection and due process. Justice Frankfurter, concurring, noted that "the judgment here

challenged involves the application of a conception like that of 'moral character', which has shadowy rather than precise bounds," and concluded that a "refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason" contravened the Due Process Clause.[9]

Defendants may gain nothing from the argument that no one has a constitutional right to teach in public schools since that "is only to say that [a person] must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities." Slochower v. Board of Education of New York, 350 U.S. 551, 555, 76 S.Ct. 637, 639, 100 L.Ed. 692, 699 (1956). "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents, 385 U.S. 589, 605-606, 87 S.Ct. 675, 685, 17 L.Ed.2d 629, 642 (1967); Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

The unconstitutional vice of the policy, as understood and enforced by Pettey, is that it conclusively presumes the parent's immorality or bad moral character from the single fact of a child born out of wedlock.[10] By the

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9. *Schware* was applied by us in Lipman v. Van Zant, 329 F.Supp. 391 (3-judge, N.D.Miss.1971), to invalidate a one-year durational residency requirement for a bar applicant to take the Mississippi bar examination on the ground that such residency was wholly unrelated to the state's interest in securing a capable and competent bar.

10. An extract from the superintendent's testimony reads as follows:

"THE COURT: Mr. Pettey, you do not think the facts or circumstances under which an illegitimate birth occurred [are] at all relevant to the issue of good character or bad character?

(Continued on following page)

rule, a parent, whether male or female, who has had such a child, would be forever precluded from employment. Thus, no consideration would be given to the subsequent marriage of the parent or to the length of time elapsed since the illegtimate birth, or to a person's reputation for good character in the community. A person could live an impeccable life, yet be barred as unfit for employment for an event, whether the result of indiscretion or not, occurring at any time in the past. But human experience refutes the dogmatic attitude inherent in such a policy against unwed parents. Can it be said that an engaged woman, who has premarital sex, becomes pregnant, and whose fiance dies or is killed prior to their marriage, is morally depraved for bearing the posthumous child? The rule allows no compassion for the person who has been unwittingly subjected to sexual relations through force, deceptive design or while under the influence of drugs or alcohol, yet chooses to have the child rather than to abort it. The rule makes no distinction between the sexual neophyte and the libertine. In short, the rule leaves no consideration for the multitudinous circumstances under which illegitimate childbirth may occur and which may have little, if any, bearing on the parent's present moral worth. A past biological event like childbirth out

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Footnote Continued—

THE WITNESS: No, sir. That would be hard to get at. I think the fact that the birth occurred without the benefit of matrimony is, to me, proof enough of the—

THE COURT: Is conclusive?

THE WITNESS: Yes, sir.

* * *

THE COURT: . . . Suppose a woman had an illegitimate child and then later married either the father of the child or another man. When she presented herself to you she showed she was married and had a child, one child. Would you consider her for employment?

THE WITNESS: No, sir, I would not.

of wedlock, even if relevant to the issue, may not be controlling; and that it may be considered more conventional or circumspect for the infant to be surrendered to others for upbringing rather than be reared by the natural parent is hardly determinative of the matter. Furtheremore, the policy, if based on moral judgment, has inherent if unintended defects or shortcomings. While obviously aimed at discouraging prematerial sex relations, the policy's effect is apt to encourage abortion, which is itself staunchly opposed by some on ethical or moral grounds.[11] It totally ignores, as a disqualification, the occurrence of extramarital sex activity, though thought of by many as a more serious basis for moral culpability.[12] Indeed, the superintendent's fiat, altogether unsupported by sociological data, equates the single fact of illegitimate birth with irredeemable moral disease.[13] Such a presumption is not only patently absured, it is mischievous and prejudicial, requiring those who administer the policy to "investigate" the parental status of school employees and prospective applicants. Where no stigma may have existed before, such inquisitions by overzealous officialdom can rapidly create it.

[6] Granted that many unwed parents may be bereft of morality, and thus unfit for employment in public schools, the policy nonetheless does also bar those persons who, though unwed parents, may have unquestionably good character and high qualifications of job fitness. Since

11. See majority opinion by Mr. Justice Blackmun, in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, 166, especially Fn. 22 and 23.

12. Seventh Commandment: Thou shalt not commit adultery. 20 Exodus 14.

13. In its quest for understanding the court allowed counsel substantial latitude in presenting evidence, as the transcript will show, and rejects a plenitude of material proffered by both sides as irrelevant to the case.

the rules operates arbitrarily and capriciously to prevent certain persons from receiving employment consideration, it constitutes an invidious discrimination and is violative of equal protection. The fact that the two plaintiffs, Ms. Andrews and Ms. Rogers, were either discharged or not considered for employment, without any inquiry whatsoever into their present good moral character but solely because of the stated policy, constitutes a denial of their due process rights.

In Perry v. Grenada Municipal Separate School District, 300 F.Supp. 748 (N.D.Miss.1969), this court applied the foregoing principles to a somewhat analogous case. In *Perry*, the court struck down a school board policy which excluded unwed mothers from admission to high school as violative of equal protection and due process. Judge Orma R. Smith wrote (p. 753): "[T]he fact that a girl has one child out of wedlock does not forever brand her as a scarlet woman undeserving of any chance for rehabilitation or the opportunity for future education."

Although never faced with the precise question of excluding unwed parents as teachers or students in public schools, the Supreme Court, in its recent decision of Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), reiterated in the plainest terms the constitutional impermissibility of using presumptions which offend equal protection and due process. By an Illinois statute, children of unwed parents became wards of the state upon the death of their mother, thus excluding any right in the natural father to obtain their custody. The statute conclusively presumed the father of an illegitimate child to be an unfit parent, without affording him opportunity to prove his fitness. The Court held this statute to be violative of both equal protection and due process. Acknowledging that Illinois had a legitimate interest in protecting

the moral well-being of a minor child and in strengthening the child's family ties, the Court, speaking through Mr. Justice White, emphasized:

> "[W]e are not asked to evaluate the legitimacy of the state *ends*, rather, to determine whether the *means* used to achieve these ends are constitutionally defensible. . . . It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children. Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring. Had this been so, the State's statutory policy would have been furthered by leaving custody in him." (405 U.S. at 652, 654, 92 S.Ct. at 1213) (Emphasis added).

[7] As a second rationale for their rule, defendants urge that the mere presence of an unwed parent in an educational environment may likely adversely affect the morals of school children and enhance the likelihood of schoolgirl pregnancies. Assuming that libido can be taught in the classroom, there is no evidence that plaintiffs or others were attempting or would have attempted to proselytize students. To the contrary, plaintiffs have never attempted to publicize their parental status. Thus, defendants' reliance on McConnell v. Anderson, 451 F.2d 193 (8 Cir. 1971) is not well placed. In *McConnell*, the Eighth Circuit upheld the University of Minnesota Board

of Regents' refusal to employ a self-avowed gay activist whose attempted "marriage" to a fellow homosexual had attracted wide media coverage.

[8] Defendants express serious concern about the importance of employee role modeling; that is, they assert it is imperative for teachers as well as other school employees to project a "proper" image to students of impressionable age. We are compelled to once again emphasize that the record is devoid of evidence of proselytization. In the absence of overt, positive stimuli to which children can relate, we are convinced that the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative. We are not at all persuaded by defendants' suggestions, quite implausible in our view, that students are apt to seek out knowledge of the personal and private family lifestyles of teachers or other adults within a school system (i. e., whether they are divorced, separated, happily married or single, etc.), and, when known, will approve of and seek to emulate them.

[9] Finally, counsel for defendants urge that, quite apart from any notion of morality, the policy permissibly seeks to regulate a "status" situation, but, if so, "parental status" as a basis of classification is no less offensive to the Fourteenth Amendment than religious or racial status classifications or other groupings arbitrarily and unreasonably made by or on behalf of the state.

An additional, alternative ground of our decision is that, assuming a rational relation does exist between the Drew policy and legitimate educational objectives, the rule creates an inherently suspect classification based on sex, i. e., single women, which cannot survive strict scrutiny mandated by the Fourteenth Amendment.

We note that only unmarried females have been prohibited from employment under the policy; and it is self-evident that the rule can only be applied against them. Although the rule professes to be neutral, proscribing employment of any parent, male or female, of an illegitimate child, the rule cannot operate that way. Unless the man either admits paternity or is so adjudged judicially, it is virtually impossible to prove his involvement. Nature does not readily, if ever, identify the offspring's sire. A woman, however, is impregnated, gives birth, and often raises the child alone. Mr. Pettey freely conceded that mothers of illegitimate children are easier to discover than fathers because, in his words "the unwed mother is stuck with the result." Further, although Ms. McCorkle emphatically stated that she would apply the rule equally to both male and female, when asked how she knew that a certain male teacher's aide had not fathered an illegitimate child, she replied, "because he is married."

Plaintiffs contend that the birth of a child is not an immoral or illicit event, but rather a biological and physiological fact. Thus, the true intent of the rule is, or logically should be, directed to the practice of premarital coitus, of which pregnancy and eventual childbirth is mere evidence. If such be the case and morality is the true issue, plaintiffs contend that the regulation, to be constitutional, must be equally burdensome against male employees who may participate in such "immoral" acts.[14] We must agree, and under strict review now mandated for sex-based classification, the obvious distinction in the rule's applicability is not constitutionally justified. Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d

14. We do not express any view concerning a regulation respecting pregnancy of a classroom teacher during the school term, as such a case is beyond the scope of this opinion.

583 (1973). In *Frontiero*, a married woman Air Force officer sought coequal housing and medical benefits for her dependent husband under federal statutes which disallowed such benefits to a woman officer who provided less than one-half of her spouse's support. The statutes automatically granted male officers such benefits for their dependent wives without consideration of percentage of support. In holding the statutory scheme constitutionally invalid, because of the special burden imposed upon female officers over males similarly situated, the Supreme Court ruled that "classifications based on sex, like classifications based on race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." 93 S.Ct. at 1771.[15]

Defendants argue that when a single woman engages in premarital sexual relations, becomes pregnant and begets an illegitimate child, she voluntarily places herself

15. Mr. Justice Brennan, speaking for the Court in *Frontiero*, declared:

> "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage.
>
> . . . . .
>
> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .' Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972). And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." 93 S.Ct. at 1769.

in a classification in which men are not similarly situated, and hence, a regulation which treats such women differently is justified. The rule, however, is directed to parents of illegitimate children, and, save artificial insemination, a male who sires an illegitimate child is equally the partner to the sexual act and is equally the parent of the child, even though the mother may be "stuck with the result." Voluntariness of a classification is certainly not an issue. In *Frontiero,* more burdensome treatment of a married woman officer in the armed services, although it was no doubt her voluntary choice to take connubial vows, was not tolerated.

The essentially discriminatory effect of the Drew policy upon unmarried women is inescapable. Although stated in another context but expository of what we believe to be the truth here controlling are the words of Chief Justice Burger, dissenting in Stanley v. Illinois:

> "In almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood." 405 U.S. at 665, 92 S.Ct. at 1220.

[10] Where a state has adopted a suspect classification like sex, it "bears a heavy burden of justification". McLaughlin v. Florida, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222 (1964). "In order to justify the use of a suspect classification, a state must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification 'necessary

to the accomplishment' of its purpose or the safeguarding of its interest." Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973). The defendants in the case sub judice have made no showing whatever that their policy against employing unwed parents serves a compelling state interest or is necessary for the operation of an educational program. Hence, the policy cannot survive strict judicial scrutiny.

Judgment for plaintiffs shall be entered in accordance with this Opinion.

Supreme Court, U. S.
FILED
JAN 15 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
Petitioners,

vs.

KATIE MAE ANDREWS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

Petition for Certiorari Was Timely Filed
Certiorari Granted October 6, 1975

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Kenneth B. Clark for Plaintiffs (Tr. 1-28) 183-198
Examination by Mr. Wall (Tr. 2-28) 183-198
Edmund Gordon for Plaintiffs (Tr. 1-35) 199-216
Examination by Mr. Myers (Tr. 3-35) 199-216

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
Petitioners,

vs.

KATIE MAE ANDREWS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

DOCKET ENTRIES

2-20-73 Filed Complaint - Issued Summons.
Mailed AO 78 Card to Courtroom Deputy.
Mailed J.S. 5 cards to Oxford, along with index cards.
Mailed notice of assignment of case to Judge Smith.

2-26-73 Filed Marshal's return executed 2-20-73 on L. L. Vance, Boyle, Miss.
Filed Marshal's return executed 2-20-73 on G. F. Petty, Drew, Miss.
Filed Marshal's return executed 2-20-73 on G. W. Moody, Drew, Miss.

Filed Marshal's return executed 2-20-73 on T. E. Parker, Drew, Miss.
Filed Marshal's return executed 2-20-73 on J. H. McCaskill, Drew, Miss.
(Service on his atty. Champ Terney)
Filed Marshal's return executed 2-20-73 on W. J. Dubard, Drew, Miss.
(Service on his atty. Champ Terney)
Filed Marshal's return executed 2-20-73 on Drew Municipal Separate School District, Drew, Miss. (Service on L. L. Vance).

2-26-73 Received letter from Luke Dove to attys. of record setting hearing in Clarksdale, Miss on 3-7-73 at 10 A.M.

2-26-73 Filed Notice of Motion; filed by Johnnie E. Walls, Jr.

3- 2-73 Mailed Notice of Hearing resetting case for 3-19-73 in Greenville at 10 A.M.

3- 7-73 Received copy of letter from Law Clerk to attys. of record setting hearing in Oxford, Miss. on March 16, 1973 at 9 A.M.

3-13-73 Filed Plaintiffs' Corrected Memorandum Of Law In Support Of The Motion For Preliminary Injunction; filed by Charles Victor McTeer. North Miss. Rural Legal Services reports that they mailed a copy of same to Judge Smith.

3-20-73 Filed Civil Minutes - General: Matter taken under advisement as to pre. inj. Center for Constitutional Rights allowed to participate in case; counsel to submit briefs.

3-20-73 Received and entered Order Granting Leave For Center For Constitutional Rights To Participate As Amicus Curiae, signed by Judge Keady on

3-20-73. COB 13, page 23. Mailed notice of order - notice also showing reassignment of case to Judge Keady.

4- 2-73 Filed Motion Of The United States Equal Employment Opportunity Commission To File Brief As *Amicus Curiae*; filed by Equal Employment Opportunity Commission. Copy mailed to Judge Keady.

4- 4-73 Received and entered Order signed by Judge Keady on April 3, 1973 granting motion of Equal Employment Opportunity Commission to file brief as amicus curiae. COB 13, page 43.

4- 5-73 Filed transcript of Testimony Of George Ferris Pettey taken 3-16-73 before Judge Keady.

4-10-73 Received original and one copy of Plaintiff's Rejoinder Memorandum Of Law In Support Of The Motion For Preliminary Injunction. Mailed both copies to Luke Dove in Corinth.

4-12-73 Filed Answer of defendants; filed by Champ T. Terney.

4-12-73 Filed transcript of proceedings had on March 16, 1973 in Greenville, Miss. before Judge Keady.

4-12-73 Filed transcript of proceedings had on March 20, 1973 before Judge Keady in Greenville, Miss.

4-17-73 Received Brief Of The United States Equal Employment Opportunity Commission As Amicus Curiae In Support Of Plaintiffs' Motion For Preliminary Injunction. Mailed same to Ray Mitchell.

5-11-73 Received and entered Order signed by Judge Keady on 5-10-73 setting this cause down for

hearing on Thursday, May 31, 1973 at 9 A.M. COB 13, pages 130-131. Mailed notice of order to attys. of record.

5-18-73 Filed Notice To Take Deposition of Dr. Ernest van den Haag on 5-25-73 in New York.

5-23-73 Filed Notice To Take Deposition of Dr. Kenneth Clark on 5-29-73 in New York.

5-23-73 Filed Notice To Take Deposition of Dr. Edmund Gordon and Dr. Ronald Samuda on 5-29-73 in New York.

5-30-73 Filed Notice Of Motion with Motion For Leave To Amend Complaint. Gave copy of both notice and motion to Judge Keady.

5-31-73 Filed Motion For a Permanent Injunction. Copy to Judge.

5-31-73 Filed copy of letter from A. F. Summer, Atty. Gen. to Members Of Clergy In Mississippi.

5-31-73 Filed Civil Minutes - General: Held in Greenville, Miss. on 5-31-73. Case taken under advisement after evidentiary hearing.

6- 1-73 Filed Deposition of Ernest van den Haag, taken in New York on 5-16-73.

6- 5-73 Filed Deposition of Edmund Gordon, taken in New York on 5-29-73 at 2:30 P.M.

6- 5-73 Filed Deposition of Dr. Kenneth B. Clark, taken in New York on 5-29-73 at 10:30 A.M.

6- 6-73 Filed Curriculum Vitae; filed by Johnnie E. Walls, Jr.
Filed Kenneth B. Clark: A Bibliography; filed by Johnnie E. Walls, Jr.
Filed Kenneth B. Clark: A Bibliography Additions—July, 1971, filed by Walls.

Filed "Dr. Kenneth B. Clark"; filed by Johnnie E. Walls.
(all above papers placed in unsealed envelope in file).

7- 3-73 Received Memorandum Opinion signed by Judge Keady on 7-3-73.

7- 3-73 Received and entered Judgment signed by Judge Keady on 7-3-73 reinstating Ms. Lestine Rogers as teacher's aide and granting compensation of $250.00 a month for the 1972-73 school year. Ms. Katie Mae Andrews is awarded damages at the rate of $450 per month for the second semester of the 1972-73 school year. This Judgment has been entered in COB 13, pages 226-228. Mailed notice of judgment.

J.S. 6

7- 9-73 Received letter from Judge requesting substitution of page 14 in the original Memorandum Opinion dated July 3, 1973. Substituted same.

7-11-73 Filed Notice Of Appeal (called Mr. Terney's office for bond and filing fee). Mailed copy of Notice of Appeal, with copy of docket sheet entries, to Court of Appeals. Mailed copy of Notice to attys. of record. Gave one copy of Notice to Court Reporter and one copy to Law Clerk.

7-13-73 Filed Bond For costs ($250.00), with General Power Of Attorney attached.

7-13-73 Issued Receipt #23369 to Hon. Heber Ladner, Jr., filing fee for Notice of Appeal.

8- 2-73 Filed Notice of Cross Appeal; filed by Charles V. McTeer. Bond is being forwarded from

North Miss. Legal Services. Mailed copy to Ct. of Appeals, to attys., gave copy to Judge and to Court Reporter.

8- 3-73 Issued R #23404 to North Miss. Rural Legal Services for $250.00 cash bond for appeal. Returned their $5.00 check dated 8-2-73 for filing fee and this fee was paid 8-2-73 by Charles McTeer.

8-10-73 Filed Notice of Motion and Motion For Stay Without Supersedeas Bond. Gave copy of both notice and motion to Judge Keady.

8-13-73 Mailed notice of Hearing set for August 17, 1973 at 3 P.M. in Greenville.

8-20-73 Filed Civil Minute Order; held 8-17-73 in Greenville (25 Min.) Deft. motion for stay without supersedeas - granted but deft must give $25,000.00 bond and pay all costs of court.

8-21-73 Received and entered Order signed by Judge Keady on August 17, 1973 concerning motion for stay of judgment without posting of supersedeas bond. COB 14, page 26. Mailed notice of Order to attys. of record.

8-30-73 Filed Motion To Pledge Securities For Supersedeas Bond.

8-31-73 Received and entered Order signed by Judge Keady on 8-31-73 concerning deft's motion for authority to pledge funds totaling $25,000.00. COB 14, pg. 55. Mailed notice of order to attys. of record.

9- 4-73 Filed transcript of proceedings had in Greenville, Miss. on 5-31-73 before Chief Judge William C. Keady.

9- 7-73 Filed Supersedeas Bond. Copy to Judge Keady by Mr. Terney.

9-11-73 Mailed original record, transcript and exhibits to Court of Appeals, with copy of transmittal letter to all attorneys of record. Certified No. 357545.

10- 2-73 Received and entered Order denying pltfs' motion for an award of atty's fees, signed by Judge Keady on 10-2-73. COB 14, pg. 202. Mailed notice of order to attys.

10-11-73 Issued Fieri Facias by request of Mr. Falton O. Mason, Jr., Asst. U.S. Atty.

12-17-73 Filed Motion To Substitute Security Of Supersedeas Bond. Copy of motion given to Judge Keady.

12-17-73 Received and entered Order signed by Judge Keady on 12-17-73 granting deft's motion to substitute security on supersedeas bond. COB 15, pg. 1-2. Mailed notice of order to attys. of record. Mailed copy of order to Clerk's office in Oxford for check to be issued.

1- 2-75 Rec'd and entered respecting substitution of security on supersedeas bond, signed by Judge Keady on 1-2-75. COB 17, pg. 3-4. Mailed notice of order to attys. Mailed copy of order to Clerk's office in Oxford.

1- 2-75 Rec'd and entered Notice of Motion and Motion To Substitute Security Of Supersedeas Bond. Copies to Judge Keady.

1- 7-75 Rec'd from Champ Terney and placed in vault (until Chief Dep. talks with Ct. of Appeals) safekeeping receipt #3201 to be substituted for No. 2771.

1-10-75 Filed copy of letter from Chief Deputy Clerk to Court of Appeals respecting safekeeping receipts.

1-23-75 Mailed to Champ Terney by certified mail Safekeeping Receipt No. 2771 as directed in Order of 1-2-75. Safekeeping Receipt No. 3201 still in vault.

3-19-75 Rec'd Original Record back from Court of Appeals.

3-19-75 Filed certified copy of Judgment issued as Mandate 3-14-75 affirming judgment of District Court. Filed copy of Court's opinion. Mailed copy of judgment and opinion to Judge Keady and one copy to each attorney.

3-19-75 Filed Copy of Bill of Costs.

10-10-75 Rec'd and entered Order granting permission for defts to remove from court appeal transcript from Fifth Circuit, signed by Judge Keady 10-10-75. COB 18, pg. 260.

IN THE
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI GREENVILLE DIVISION

CIVIL ACTION NO. GC-73-20-S

KATIE MAE ANDREWS, and LESTINE ROGERS,
Plaintiffs,
v.
DREW MUNICIPAL SEPARATE SCHOOL DISTRICT BOARD OF TRUSTEES, G.F. PETTY, Superintendent; L. L. VANCE, President; J. H. McCASKILL, Secretary; G. W. MOODY, W. J. DUBARD and T. E. PARKER,
Defendants.

COMPLAINT

(Filed February 20, 1973)

1. This is an action for declaratory and injunctive relief to redress the deprivation of rights and privileges and immunities of the plaintiffs guaranteed by the 42 U. S. C. 1981, 1983 et seq., Title VI of the Civil Rights Act of 1964 42 U. S. C. Section 2000d et seq., the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs further ask for declaratory relief under 28 U. S. C. 2201, 2202.

2. This Court has jurisdiction of this cause pursuant to 28 U. S. C. Section 1343.

3. This cause of action rests upon 42 U. S. C. Sections 1981, 1983 et seq., Title VI of the Civil Rights Act of 1964 Section 42 U. S. C., 2000d et seq., the Fifth and Fourteenth Amendments to the United States Constitution.

PARTIES

4. Plaintiff Katie Mae Andrews is a black female certified to teach in the public schools of the State of Mississippi. Plaintiff is a citizen of the United States and a resident of the State of Mississippi, plaintiff is unmarried and has one child.

5. Plaintiff Lestine Rogers was formerly employed by the Drew Municipal Separate School District as a teachers' aide from September, 1971 to May, 1972. Plaintiff is a citizen of the United States and a resident of the State of Mississippi. Plaintiff is unmarried and has one child.

6. The defendants are the Drew Municipal Separate School District, Superintendent and Board of Trustees thereof created through the laws of the State of Mississippi. Upon information and belief, all defendants are residents of the United States and of Sunflower County, Mississippi.

FACTS

7. In December, 1972 plaintiff Andrews, applied for both teaching and teacher's aide positions in the Drew Municipal Separate School District. She was instructed by an agent of the defendants a Mrs. McCorkle that she would be called before January 18, 1973 as to when and where she would report for employment. On January 15, plaintiff went to defendants agent again and was instructed that she could not apply because she was unmarried and the mother of a child. Defendant's agent McCorkle stated that this practice was a rule of the Drew Municipal Separate School District dictated by Mr. G. F. Petty, Superintendent.

8. Plaintiff Rogers was employed by defendant school district during the school year September, 1971 to June,

1972. She began her employment on September, 1971. In May, of the school year 1971-1972 plaintiff was discharged from her employment by defendant's agent, Mrs. Corkle. Plaintiff was told she was discharged because she was unmarried and had one child.

9. On information and belief the Drew Municipal Separate School District receives federal aid and assistance in the administration and execution of its educational program.

10. Plaintiffs Andrews and Rogers were respectively refused employment and discharged due to their race, sex and single parent status, by defendants.

VIOLATIONS OF LAW

11. Defendants refusal to employ plaintiff Andrews and termination of plaintiff Rogers delegates plaintiffs into an unconstitutionally created classification based upon their race, sex and unmarried parent status in violation of 42 U. S. C., 1981, 1983 et seq., and the Civil Rights Act of 1964, Section 2000d, the Fifth and Fourteenth Amendment.

12. Defendants refused to hire plaintiff Andrews as a school teacher because of her race, sex and single parent status in violation of 42 U. S. C. 1981, 1983 et seq. Section 2000d the Civil Rights Act of 1964 the Fifth and Fourteenth Amendments.

13. Defendants discharged plaintiffs Rogers from her teacher's aide position because of her race, sex, and single parent status in violation of 42 U. S. C. 1981 et seq. Section 2000d of the Civil Rights Act of 1964, the Fifth and Fourteenth Amendments.

WHEREFORE, Plaintiffs pray that this Court grant them relief as follows:

a. Declaring that the racially discriminatory practices and policies outlined above in the complaint are unlawful.

b. Enjoin the defendants, their officers, agents, employees, successors and all other persons acting in concert with them under their authority from continuing to follow all such practices and policies declared unlawful.

c. Awarding plaintiffs damages in the form of back pay they would have received had they not been discriminated against and refused employment because of their race, sex and single parent (unmarried) status.

d. Reinstate Plaintiff Rogers to her position as teacher's aide;

e. Order that Plaintiff Andrews be hired to a teaching position within the Drew Municipal Separate School District;

f. Awarding Plaintiffs such other further relief as may be just and proper, including their costs and reasonable attorney's fees.

Respectively submitted,

/s/ Charles Victor McTeer
Drawer H
Mound Bayou, Mississippi 38762
Catherine P. Mitchell
Box 589
Mound Bayou, Mississippi 38762
Johnnie E. Walls, Jr.
Willie L. Bailey
Box 1909
Greenwood, Mississippi 38930
Lewis Myers
108 1/2 South Lamar
Oxford, Mississippi 38655
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI GREENVILLE DIVISION

(Title Omitted in Printing)

ANSWER

(Filed April 12, 1973)

Come now the Drew Municipal Separate School District, G. F. Pettey, Superintendent, L. L. Vance, President, J. H. McCaskill, Secretary, W. J. DuBard, G. W. Moody and T. E. Parker, Defendants herein, by and through their attorneys of record, and file this their answer to the Complaint filed herein against them, and by way of answer state unto the Court as follows:

I

The Defendants deny the allegations of Paragraph 1 of the Complaint.

II

The Defendants deny the allegations of Paragraph 2 of the Complaint.

III

The Defendants deny the allegations of Paragraph 3 of the Complaint.

IV

The Defendants admit the allegations of Paragraph 4 of the Complaint, but are without knowledge as to whether or not Katie Mae Andrews is certified to teach in the public schools of the State of Mississippi and, therefore, denies the same.

V

The Defendants admit the allegations of Paragraph 5 of the Complaint.

VI

The Defendants admit the allegations of Paragraph 6 of the Complaint.

VII

The Defendants deny the allegations of Paragraph 7 of the Complaint, except they do admit that in December of 1972, Plaintiff Andrews applied for a teachers aide position in the Drew Municipal Separate School District.

VIII

The Defendants admit the allegations of Paragraph 8 of the Complaint insofar as they state that Plaintiff Rogers was employed by the Defendant school district during the school year September, 1971 to June, 1972, and show that said Plaintiff was allowed to complete the full 1971-72 school year of employment, and further that said Plaintiff was advised that she would not be employed for the 1972-73 school year.

IX

The Defendants admit the allegations of Paragraph 9 of the Complaint.

X

The Defendants deny the allegations of Paragraph 10 of the Complaint.

XI

The Defendants deny the allegations of Paragraph 11 of the Complaint.

XII

The Defendants deny the allegations of Paragraph 12 of the Complaint.

XIII

The Defendants deny the allegations of Paragraph 13 of the Complaint.

AFFIRMATIVE DEFENSES

XIV

The Court lacks jurisdiction to hear the cause.

XV

These Defendants state affirmatively that the regulation in the Defendant school district presently enforced by the Defendant Pettey is not discriminatory against any person because of their race or sex. The policy excludes both men and women who are unwed parents and is applied to blacks and whites alike. Said rule as stated and enforced is not arbitrarily unreasonable or capricious and that it is, in fact, necessary for the proper administration and discipline of the Drew Public Schools. The Defendants further submit that the regulation bars only upon the Plaintiffs open and notorious display of a status which is within the province of the school district to regulate in determining who may teach.

XVI

The Defendants submit to the Court that the filing of this law suit by Plaintiffs is frivolous and without merit, and these Defendants are entitled to a reasonable attorney fee for the defense of this action and for all costs incurred herein to be recovered from the Plaintiffs.

WHEREFORE, the Defendants having fully answered the allegations against them in the Complaint filed herein, and showing unto the Court certain affirmative matter, ask the Court that the Complaint filed herein against them be dismissed, with prejudice, and the relief therein requested be denied, with all costs taxed to Plaintiffs together with a reasonable attorney fee awarded these Defendants from Plaintiffs.

Respectfully submitted,

Drew Municipal Separate School District, et al

By /s/ Champ Terney
Attorney for Defendants

Of Counsel:
Lyon, Crosthwait & Terney
Attorneys at Law
100 Court Street
Indianola, Mississippi

DEFENDANTS' EXHIBIT 1

DREW PUBLIC SCHOOLS
DREW, MISSISSIPPI
TITLE I, ESEA

TEACHER-AIDE APPLICATION

single with a child 3 mos

Name: Andrews (Last) Katie (First) Mae (Middle) Age: 22

Mailing Address: Post Office Box 22 (City) Drew (State) Mississippi

Telephone No: None 745-3238 Married: ___ Single: ✓ Other: ___ (Specify)

Has a child

No. of Children: 0 Age of Children: — Health: Good

Highest Level of Education Attained: (check one)

✓ High School Graduate
___ 1 year College
___ 2 year College
___ 3 year College
✓ College Graduate

High School Attended: Hunter High School Date of Graduation: 5/67

College Attended: Mississippi Valley State College Last Year Attended: 9/72

Last Employer: Baxter's Laboratory Cleveland, Miss.

Date of Last Employment: ___

Signature of Applicant: Katie Mae Andrews

Date of Application: 12/12/72

BEST COPY AVAILABLE

The applicant would have been hired in January 1973 if she had not received unfavorable information from Mrs Clara Robinson and a Miss at Drew Elementary that she had a child. The applicant stated on her application that she was single and had no children. When she called by phone in January she informed her of the illegitimate baby and have had no contact with the applicant since then.

DEFENDANTS' EXHIBIT 18

Winters

PUBLIC SCHOOLS
DREW, MISSISSIPPI
TITLE I, ESEA

TEACHER-AIDE APPLICATION

Name: Royer (Last) Lottie (First) _____ (Middle) Age 20

Mailing Address: General Delivery

Telephone: 745-2866 Married: ____ Single: ✓ No. of Children: 1 2

Health: Good Age of children: 9 mos.

Highest Level of Education Attained: (check one)

✓ High School Graduate ____ 3 year College

____ 1 year College ____ College Graduate

____ 2 year College

High School Attended: Drew High School Date of Graduation: 5-25-71

College Attended: _____ Last year Attended: _____

Last Employer: _____

Date of Last Employment: _____

Signature of Applicant: Lottie Royer

DEFENDANTS' EXHIBIT 19

PLAINTIFFS' EXHIBIT 3

MISSISSIPPI
STATE BOARD OF HEALTH
JACKSON, MISSISSIPPI 39205

HUGH S. COTTRELL, M.D., M.P.H.
STATE HEALTH OFFICER

March 16, 1973

Mr. Victor McTeen
Box 594
Mound Bayou, Mississippi 39762

Dear Mr. McTeen:

As requested, we are sending you information on illegitimate births in Mississippi for the five most recent years for which it is available. The data on the enclosed tables were compiled by the Statistical Services Unit of the State Board of Health from information recorded on live birth certificates filed with the Vital Records Registration Unit of the State Board of Health.

Sincerely yours,

Catherine P. Klipple

(Mrs.) Catherine P. Klipple
Supervisor
Statistical Services Unit

CPK:h
enclosures

TOTAL LIVE BIRTHS AND NUMBER AND PERCENT ILLEGITIMATE
BY COUNTY OF RESIDENCE AND RACE
MISSISSIPPI, 1971

County	Total			White			Nonwhite		
	Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births	
		Number	Percent		Number	Percent		Number	Percent
STATE	48,601	9,740	20.0	25,199	807	3.2	23,402	8,933	38.2
Adams	861	260	30.2	366	28	7.6	495	23.2	46.9
Alcorn	472	56	11.9	389	22	5.6	83	34	41.0
Amite	236	45	19.1	79	1	1.3	157	44	28.0
Attala	373	77	20.6	172	5	2.9	201	72	35.8
Benton	119	13	10.9	77	2	2.6	42	11	26.2
Bolivar	1,467	602	41.0	346	9	2.6	1,121	593	52.9
Calhoun	278	47	16.9	159	2	1.2	119	45	37.8
Carroll	143	30	21.0	57	0	-	86	30	34.9
Chickasaw	371	55	14.8	212	6	2.8	159	49	30.8
Choctaw	127	26	20.5	71	2	2.8	56	24	42.8
Claiborne	197	68	34.5	35	2	5.7	162	66	40.7
Clarke	296	44	14.9	160	4	2.5	136	40	29.4
Clay	415	89	21.4	163	8	4.9	252	81	32.1
Coahoma	920	333	36.2	222	8	3.6	698	325	46.6
Copiah	512	127	24.8	189	5	2.6	323	122	37.8
Covington	306	49	16.0	159	4	2.5	147	45	30.6
DeSoto	855	149	17.4	538	15	2.8	317	134	42.3
Forrest	1,181	182	15.4	750	30	4.0	431	152	35.3
Franklin	114	23	20.2	43	0	-	71	23	32.4
George	296	16	5.4	264	8	3.0	32	8	25.0
Greene	208	35	16.8	136	5	3.7	72	30	41.7
Grenada	428	81	18.9	180	5	2.8	248	76	30.6
Hancock	334	22	6.6	284	8	2.8	50	14	28.0
Harrison	3,236	337	10.4	2,472	107	4.3	764	230	30.1
Hinds	4,396	920	20.9	2,108	79	3.7	2,288	841	36.8
Holmes	469	149	31.8	87	2	2.3	382	147	38.5
Humphreys	314	106	33.8	67	3	4.5	247	103	41.7
Issaquena	45	12	26.7	18	3	16.7	27	9	33.3
Itawamba	260	7	2.7	242	3	1.2	18	4	22.2
Jackson	2,153	162	7.5	1,675	41	2.4	478	121	25.3
Jasper	327	61	18.6	105	2	1.9	222	59	26.6
Jefferson	177	64	36.2	21	1	4.8	156	63	40.4
Jeff Davis	289	63	21.8	103	6	5.8	186	57	30.6
Jones	1,062	148	13.9	718	23	3.2	344	125	36.3
Kemper	194	43	22.2	41	2	4.9	153	41	26.8
Lafayette	481	61	12.7	301	8	2.6	180	53	29.4
Lamar	328	24	7.3	270	3	1.1	58	21	36.2
Lauderdale	1,666	293	17.6	962	35	3.6	704	258	36.6
Lawrence	252	47	18.6	130	5	3.8	122	42	34.4
Leake	339	48	14.2	158	4	2.5	181	44	24.3
Lee	995	110	11.0	711	24	3.4	284	86	30.3
Leflore	1,017	319	31.4	283	11	3.9	734	308	42.0

Page 4
Total Live Births and Number and Percent Illegitimate
By County of Residence and Race - Mississippi - 1971

County	Total			White			Nonwhite		
	Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births	
		Number	Percent		Number	Percent		Number	Percent
Lincoln	606	89	14.7	353	9	2.5	253	80	31.6
Lowndes	1,205	244	20.2	669	12	1.8	536	232	43.3
Madison	807	235	29.1	228	8	3.5	579	227	39.2
Marion	460	56	12.2	270	8	3.0	190	48	25.3
Marshall	635	183	28.8	188	3	1.6	447	180	40.3
Monroe	746	103	13.8	472	7	1.5	274	96	35.0
Montgomery	250	60	24.0	100	1	1.0	150	59	39.3
Neshoba	450	66	14.7	288	12	4.5	162	54	29.7
Newton	360	49	13.6	203	7	3.4	157	42	26.8
Noxubee	344	111	32.3	66	1	1.5	278	110	39.6
Oktibbeha	600	113	18.8	308	5	1.6	292	108	37.0
Panola	615	158	25.7	222	7	3.2	393	151	38.4
Pearl River	599	61	10.2	461	13	2.8	138	48	34.8
Perry	193	28	14.5	131	3	2.3	62	25	40.3
Pike	650	128	19.7	281	10	3.6	369	118	32.0
Pontotoc	295	23	7.8	242	8	3.3	53	15	28.3
Prentiss	399	36	9.0	342	16	4.7	57	20	35.1
Quitman	419	115	27.4	120	5	4.2	299	110	36.8
Rankin	868	84	9.7	628	11	1.8	240	73	30.4
Scott	506	81	16.0	261	8	3.1	245	73	29.8
Sharkey	242	87	36.0	46	3	6.5	196	84	42.8
Simpson	405	52	12.8	216	8	3.7	189	44	23.3
Smith	286	32	11.2	180	4	2.2	106	28	26.4
Stone	197	33	16.8	126	2	1.6	71	31	43.7
Sunflower	920	324	35.2	211	8	3.8	709	316	44.6
Tallahatchie	454	180	39.6	129	5	3.9	325	175	53.8
Tate	372	111	29.8	145	4	2.8	227	107	47.1
Tippah	328	22	6.7	258	4	1.6	70	18	25.7
Tishomingo	215	9	4.2	201	2	1.0	14	7	50.0
Tunica	314	117	37.3	56	2	3.6	258	115	44.6
Union	335	29	8.6	266	4	1.5	69	25	36.2
Walthall	254	41	16.1	112	1	0.9	142	40	28.2
Warren	999	228	22.8	505	17	3.4	494	211	42.7
Washington	1,861	602	32.3	601	23	3.8	1,260	579	46.0
Wayne	360	52	14.4	208	5	2.4	152	47	30.9
Webster	158	33	20.9	94	4	4.2	64	29	45.3
Wilkinson	225	68	30.2	54	1	1.8	171	67	39.2
Winston	385	74	19.2	161	5	3.1	224	69	30.8
Yalobusha	231	51	22.1	100	2	2.0	131	49	37.4
Yazoo	544	169	31.1	194	8	4.1	350	161	46.0

ILLEGITIMATE LIVE BIRTHS BY COUNTY OF RESIDENCE AND RACE
MISSISSIPPI, 1970

County	Total			White			Nonwhite		
	Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births	
		Number	Percent		Number	Percent		Number	Percent
STATE	48,141	9,327	19.4	24,893	848	3.4	23,248	8,479	36.5
Adams	866	266	30.7	365	46	12.6	501	220	43.9
Alcorn	500	49	9.8	424	13	3.1	76	36	47.4
Amite	250	50	20.0	84	2	2.4	166	48	28.9
Attala	386	66	17.1	169	4	2.4	217	62	28.6
Benton	126	17	13.5	59	0	-	67	17	25.4
Bolivar	1,355	549	40.5	291	9	3.1	1,064	540	50.8
Calhoun	264	35	13.2	157	3	1.9	107	32	29.9
Carroll	152	33	21.7	54	1	1.8	98	32	32.6
Chickasaw	348	57	16.4	167	5	3.0	181	52	28.7
Choctaw	128	19	14.8	76	4	5.3	52	15	28.8
Claiborne	209	65	31.1	49	1	2.0	160	64	40.0
Clarke	271	45	16.6	134	4	3.0	137	41	29.9
Clay	386	78	20.2	142	6	4.2	244	72	29.5
Coahoma	949	337	35.5	232	11	4.7	717	326	45.5
Copiah	483	129	26.7	166	11	6.6	317	118	37.2
Covington	288	39	13.5	163	4	2.4	125	35	28.0
DeSoto	819	133	16.2	512	15	2.9	307	118	38.4
Forrest	1,217	195	16.0	797	33	4.1	420	162	38.6
Franklin	153	35	22.9	66	1	1.5	87	34	39.1
George	290	15	5.2	250	6	2.4	40	9	22.5
Greene	195	28	14.4	133	5	3.8	62	23	37.1
Grenada	448	94	21.0	202	8	4.0	246	86	35.0
Hancock	342	29	8.5	287	10	3.5	55	19	34.5
Harrison	3,223	302	9.4	2,491	104	4.2	732	198	27.0
Hinds	4,683	960	20.5	2,286	102	4.5	2,397	858	35.8
Holmes	555	181	32.6	94	5	5.3	461	176	38.2
Humphreys	332	117	35.2	85	4	4.7	247	113	45.7
Issaquena	56	14	25.0	17	0	-	39	14	35.9
Itawamba	279	10	3.6	260	4	1.5	19	6	31.6
Jackson	2,128	179	8.4	1,685	52	3.1	443	127	28.7
Jasper	335	48	14.3	133	3	2.2	202	45	22.3
Jefferson	194	65	33.5	20	0	-	174	65	37.4
Jeff Davis	276	57	20.6	99	5	5.0	177	52	29.4
Jones	999	138	13.8	671	19	2.8	328	119	36.3
Kemper	177	32	18.1	41	0	-	136	32	23.5
Lafayette	470	70	14.9	279	6	2.2	191	64	33.5

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Illegitimate Live Births by County of Residence and Race
Mississippi, 1970

County	Total			White			Nonwhite		
	Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births	
		Number	Percent		Number	Percent		Number	Percent
Lamar	308	31	10.1	246	10	4.1	62	21	33.9
Lauderdale	1,552	278	17.9	879	30	3.4	673	248	36.8
Lawrence	244	32	13.1	139	5	3.6	105	27	25.7
Leake	324	45	13.9	154	2	1.3	170	43	25.3
Lee	966	114	11.8	697	23	3.3	269	91	33.8
Leflore	1,068	305	28.6	310	8	2.6	758	297	39.2
Lincoln	587	95	16.2	347	18	5.2	240	77	32.1
Lowndes	1,067	210	19.7	604	15	2.5	463	195	42.1
Madison	799	247	30.9	196	7	3.6	603	240	39.8
Marion	418	75	17.9	224	9	4.0	194	66	34.0
Marshall	591	158	26.7	161	8	5.0	430	150	34.9
Monroe	681	89	13.1	408	11	2.7	273	78	28.6
Montgomery	255	62	24.3	75	0	-	180	62	34.4
Neshoba	412	48	11.6	234	5	2.1	178	43	24.2
Newton	382	59	15.4	198	6	3.0	184	53	28.8
Noxubee	326	92	28.2	83	4	4.8	243	88	36.2
Oktibbeha	572	83	14.5	312	1	0.3	260	82	31.5
Panola	598	152	25.4	214	10	4.7	384	142	37.0
Pearl River	575	51	8.9	451	11	2.4	124	40	32.2
Perry	185	22	11.9	126	2	1.6	59	20	33.9
Pike	653	118	18.1	297	11	3.7	356	107	30.0
Pontotoc	261	25	9.6	207	6	2.9	54	19	35.2
Prentiss	349	23	6.6	293	6	2.0	56	17	30.4
Quitman	405	116	28.6	124	3	2.4	281	113	40.2
Rankin	901	105	11.6	646	12	1.8	255	93	36.5
Scott	465	62	13.3	267	10	3.7	198	52	26.3
Sharkey	240	72	30.0	61	3	4.9	179	69	38.5
Simpson	441	55	12.5	234	5	2.1	207	50	24.2
Smith	276	37	13.4	166	7	4.2	110	30	27.3
Stone	173	21	12.1	115	3	2.6	58	18	31.0
Sunflower	913	298	32.6	197	5	2.5	716	293	40.9
Tallahatchie	469	148	31.6	103	2	1.9	366	146	39.9
Tate	398	114	28.6	161	6	3.7	237	108	45.6
Tippah	272	12	4.4	223	1	0.4	49	11	22.4
Tishomingo	262	8	3.0	252	4	1.6	10	4	40.0
Tunica	329	103	31.3	58	4	6.9	271	99	36.5
Union	315	40	12.7	227	8	3.5	88	32	36.4
Walthall	237	33	13.9	99	1	1.0	138	32	23.2
Warren	1,034	201	19.4	547	13	2.4	487	188	38.6
Washington	1,835	564	30.7	614	20	3.2	1,221	544	44.6
Wayne	371	49	13.2	222	4	1.8	149	45	30.2
Webster	175	36	20.6	111	9	8.1	64	27	42.2
Wilkinson	225	60	26.7	48	1	2.1	177	59	33.3
Winston	327	60	18.3	139	4	2.9	188	56	29.8
Yalobusha	218	46	21.1	81	3	3.7	137	43	31.4
Yazoo	555	137	24.7	203	6	3.0	352	131	37.2

ILLEGITIMATE LIVE BIRTHS BY COUNTY OF RESIDENCE AND RACE
MISSISSIPPI, 1969

County	Total			White			Nonwhite		
	Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births	
		Number	Percent		Number	Percent		Number	Percent
STATE	47,120	8,741	18.6	24,025	740	3.1	23,095	8,001	34.6
Adams	890	278	31.2	393	37	9.4	497	241	48.5
Alcorn	431	30	7.0	365	11	3.0	66	19	28.8
Amite	275	57	20.7	87	6	6.9	188	51	27.1
Attala	394	57	14.5	178	6	3.4	216	51	23.6
Benton	132	20	15.2	64	1	1.6	68	19	27.9
Bolivar	1,370	516	37.7	339	14	4.1	1,031	502	48.7
Calhoun	276	33	12.0	170	3	1.8	106	30	28.3
Carroll	154	22	14.3	61	1	1.6	93	21	22.6
Chickasaw	358	57	15.9	171	7	4.1	187	50	26.7
Choctaw	157	30	19.1	75	3	4.0	82	27	32.9
Claiborne	202	54	26.7	37	1	2.7	165	53	32.1
Clarke	284	53	18.7	137	3	2.2	147	50	34.0
Clay	316	58	18.4	130	2	1.5	186	56	30.1
Coahoma	943	308	32.7	243	9	3.7	700	299	42.7
Copiah	478	123	25.7	148	7	4.7	330	116	35.2
Covington	276	39	14.1	160	7	4.4	116	32	27.6
DeSoto	781	150	19.2	429	16	3.7	352	134	38.1
Forest	1,169	171	14.6	778	23	3.0	391	148	37.8
Franklin	123	18	14.6	56	2	3.6	67	16	23.9
George	279	15	5.4	238	3	1.3	41	12	29.3
Greene	186	27	14.5	129	9	7.0	57	18	31.6
Grenada	446	91	20.4	187	6	3.2	259	85	32.8
Hancock	268	19	7.1	227	7	3.1	41	12	29.3
Harrison	3,171	281	8.9	2,484	96	3.9	687	185	26.9
Hinds	4,480	833	18.6	2,132	84	3.9	2,348	749	31.9
Holmes	512	146	28.5	104	4	3.8	408	142	34.8
Humphreys	371	134	36.1	83	3	3.6	288	131	45.5
Issaquena	56	12	21.4	18	0	-	38	12	31.6
Itawamba	244	9	3.7	224	5	2.2	20	4	20.0
Jackson	2,060	156	7.6	1,582	42	2.6	478	114	23.8
Jasper	330	46	13.9	124	3	2.4	206	43	20.9
Jefferson	160	58	36.2	21	1	4.8	139	57	41.0
Jeff Davis	292	54	18.5	112	2	1.8	180	52	28.9
Jones	990	131	13.2	659	17	2.6	331	114	34.4
Kemper	221	42	19.0	57	1	1.8	164	41	25.0
Lafayette	466	60	12.9	285	1	0.4	181	59	32.6

Illegitimate Live Births by County of Residence and Race
Mississippi, 1969

County	Total			White			Nonwhite		
	Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births	
		Number	Percent		Number	Percent		Number	Percent
Lamar	297	28	9.4	246	5	2.0	51	23	45.1
Lauderdale	1,525	241	15.8	859	22	2.6	666	219	32.9
Lawrence	200	24	12.0	114	3	2.6	86	21	24.4
Leake	304	36	11.8	154	2	1.3	150	34	22.7
Lee	897	85	9.5	658	17	2.6	239	68	28.4
Leflore	1,002	272	27.1	303	3	1.0	699	269	38.5
Lincoln	532	86	16.2	327	14	4.3	205	72	35.1
Lowndes	1,008	221	21.9	502	9	1.8	506	212	41.9
Madison	768	201	26.2	169	5	3.0	599	196	32.7
Marion	485	57	11.8	283	3	1.1	202	54	26.7
Marshall	555	157	28.3	142	1	0.7	413	156	37.8
Monroe	725	95	13.1	444	19	4.3	281	76	27.0
Montgomery	230	50	21.7	96	4	4.2	134	46	34.3
Neshoba	396	43	10.8	229	6	2.6	167	37	22.2
Newton	363	51	14.0	201	9	4.5	162	42	25.9
Noxubee	345	91	26.4	68	0	-	277	91	32.8
Oktibbeha	587	90	15.3	318	1	0.3	269	89	33.1
Panola	585	168	28.7	179	9	5.0	406	159	39.2
Pearl River	556	52	9.4	439	12	2.7	117	40	34.2
Perry	192	20	10.4	130	2	1.5	62	18	29.0
Pike	580	104	17.9	256	7	2.7	324	97	29.9
Pontotoc	290	29	10.0	215	5	2.3	75	24	32.0
Prentiss	329	25	7.6	279	5	1.8	50	20	40.0
Quitman	442	131	29.6	130	2	1.5	312	129	41.3
Rankin	802	88	11.0	564	17	3.0	238	71	29.8
Scott	461	59	12.8	244	4	1.6	217	55	25.3
Sharkey	229	77	33.6	43	2	4.6	186	75	40.3
Simpson	428	50	11.7	224	5	2.2	204	45	22.0
Smith	257	38	14.8	152	6	3.9	105	32	30.5
Stone	165	25	15.2	90	1	1.1	75	24	32.0
Sunflower	954	297	31.1	208	6	2.9	746	291	39.0
Tallahatchie	503	157	31.2	99	3	3.0	404	154	38.1
Tate	405	104	25.7	157	6	3.8	248	98	39.5
Tippah	296	16	5.4	230	4	1.7	66	12	18.2
Tishomingo	239	12	5.0	225	6	2.7	14	6	42.8
Tunica	370	125	33.8	53	4	7.5	317	121	38.2
Union	336	26	7.7	264	11	4.2	72	15	20.8
Walthall	248	35	14.1	98	1	1.0	150	34	22.7
Warren	917	146	15.9	498	14	2.8	419	132	31.5
Washington	1,819	502	27.6	613	19	3.1	1,206	483	40.0
Wayne	345	55	15.9	191	7	3.7	154	48	31.2
Webster	174	28	16.1	114	5	4.4	60	23	38.3
Wilkinson	197	64	32.5	40	0	-	157	64	40.8
Winston	384	64	16.7	170	1	0.6	214	63	29.4
Yalobusha	220	55	25.0	87	2	2.3	133	53	39.8
Yazoo	637	173	27.2	233	8	3.4	404	165	40.8

ILLEGITIMATE LIVE BIRTHS BY COUNTY OF RESIDENCE AND RACE
MISSISSIPPI, 1968

County	Total			White			Nonwhite		
	Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births	
		Number	Percent		Number	Percent		Number	Percent
STATE	45,719	8,577	18.8	22,807	686	3.0	22,912	7,891	34.4
Adams	817	248	30.4	391	56	14.3	426	192	45.1
Alcorn	473	53	11.2	387	12	3.1	86	41	47.7
Amite	265	47	17.7	82	4	4.9	183	43	23.5
Attala	387	61	15.8	150	1	0.7	237	60	25.3
Benton	135	29	21.5	51	1	2.0	84	28	33.3
Bolivar	1,404	494	35.2	337	11	3.3	1,067	483	45.3
Calhoun	270	31	11.5	175	6	3.4	95	25	26.3
Carroll	153	31	20.3	49	2	4.1	104	29	27.9
Chickasaw	362	49	13.5	172	4	2.3	190	45	23.7
Choctaw	135	19	14.1	76	1	1.3	59	18	30.5
Claiborne	184	50	27.2	38	2	5.3	146	48	32.9
Clarke	269	37	13.8	135	3	2.2	134	34	25.4
Clay	375	70	18.7	140	3	2.1	235	67	28.5
Coahoma	902	291	32.3	207	6	2.9	695	285	41.0
Copiah	468	91	19.4	170	2	1.2	298	89	29.9
Covington	295	43	14.6	163	5	3.1	132	38	28.8
DeSoto	781	157	20.1	393	12	3.0	388	145	37.4
Forrest	1,119	179	16.0	726	22	3.0	393	157	39.9
Franklin	124	18	14.5	60	1	1.7	64	17	26.6
George	239	12	5.0	196	4	2.0	43	8	18.6
Greene	174	31	17.8	104	4	3.8	70	27	38.6
Grenada	427	81	19.0	178	9	5.0	249	72	28.9
Hancock	338	31	9.2	278	5	1.8	60	26	43.3
Harrison	3,054	282	9.2	2,372	86	3.6	682	196	28.7
Hinds	4,391	810	18.4	2,175	79	3.6	2,216	731	33.0
Holmes	535	163	30.5	88	2	2.3	447	161	36.0
Humphreys	393	115	29.3	98	2	2.0	295	113	38.3
Issaquena	60	15	25.0	14	0	-	46	15	32.6
Itawamba	228	9	3.9	214	5	2.3	14	4	28.6
Jackson	1,864	161	8.6	1,433	41	2.9	431	120	27.8
Jasper	292	34	11.6	106	0	-	186	34	18.3
Jefferson	176	58	33.0	20	1	5.0	156	57	36.5
Jeff Davis	260	43	16.5	94	1	1.1	166	42	25.3
Jones	954	115	12.0	650	12	1.8	304	103	33.9
Kemper	207	44	21.2	46	2	4.3	161	42	26.1
Lafayette	435	61	14.0	251	5	2.0	184	56	30.4

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Illegitimate Live Births by County of Residence and Race
Mississippi, 1968

County	Total			White			Nonwhite		
	Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births		Total Live Births	Illegitimate Live Births	
		Number	Percent		Number	Percent		Number	Percent
Lamar	281	33	11.7	222	5	2.2	59	28	47.4
Lauderdale	1,412	250	17.7	724	21	2.9	688	229	33.3
Lawrence	212	36	17.0	128	0	-	84	36	42.8
Leake	301	45	15.0	135	2	1.5	166	43	25.9
Lee	944	103	10.9	678	18	2.6	266	85	32.0
Leflore	1,017	282	27.7	262	4	1.5	755	278	36.8
Lincoln	457	71	15.5	279	8	2.9	178	63	35.4
Lowndes	992	202	20.4	491	13	2.6	501	189	37.7
Madison	772	244	31.6	159	3	1.9	613	241	39.3
Marion	444	70	15.8	248	10	4.0	196	60	30.6
Marshall	531	129	24.3	155	8	5.2	376	121	32.2
Monroe	646	89	13.8	394	10	2.5	252	79	31.3
Montgomery	254	37	14.6	111	0	-	143	37	25.9
Neshoba	376	46	12.2	233	6	2.6	143	40	28.0
Newton	349	41	11.7	181	4	2.2	168	37	22.0
Noxubee	306	87	28.4	61	0	-	245	87	35.5
Oktibbeha	543	95	17.5	285	2	0.7	258	93	36.0
Panola	610	149	24.4	209	12	5.7	401	137	34.2
Pearl River	555	68	12.2	387	10	2.6	168	58	34.5
Perry	191	23	12.0	125	3	2.4	66	20	30.3
Pike	583	99	17.0	261	4	1.5	322	95	29.5
Pontotoc	276	19	6.9	211	4	1.9	65	15	23.1
Prentiss	352	34	9.6	277	8	2.9	75	26	34.7
Quitman	385	109	28.3	102	1	1.0	283	108	38.2
Rankin	755	83	11.0	496	8	1.6	259	75	29.0
Scott	437	49	11.2	256	5	2.0	181	44	24.3
Sharkey	224	63	28.1	42	0	-	182	63	34.6
Simpson	396	49	12.4	210	7	3.3	186	42	22.6
Smith	271	29	10.7	151	2	1.3	120	27	22.5
Stone	154	21	13.6	102	1	1.0	52	20	38.5
Sunflower	994	317	31.9	192	7	3.6	802	310	38.6
Tallahatchie	457	163	35.7	75	2	2.7	382	161	42.1
Tate	367	105	28.6	119	6	5.0	248	99	39.9
Tippah	309	23	7.4	236	4	1.7	73	19	26.0
Tishomingo	195	14	7.2	188	9	4.8	7	5	71.4
Tunica	344	113	32.8	54	4	7.4	290	109	37.6
Union	324	29	9.0	241	1	0.4	83	28	33.7
Walthall	250	49	19.6	100	3	3.0	150	46	30.7
Warren	944	171	18.1	472	16	3.4	472	155	32.8
Washington	1,726	490	28.4	571	22	3.8	1,155	468	40.5
Wayne	311	49	15.8	158	6	3.8	153	43	28.1
Webster	167	22	13.2	108	1	0.9	59	21	35.6
Wilkinson	220	69	31.4	50	3	6.0	170	66	38.8
Winston	334	58	17.4	145	4	2.8	189	54	28.6
Yalobusha	210	40	19.0	89	3	3.4	121	37	30.6
Yazoo	596	147	24.7	215	4	1.9	381	143	37.5

ILLEGITIMACY BY COUNTY OF RESIDENCE AND RACE
MISSISSIPPI, 1967

County	Total			White			Nonwhite		
	Live Births	Illegitimate		Live Births	Illegitimate		Live Births	Illegitimate	
		Number	Percent		Number	Percent		Number	Percent
STATE	46,594	8,344	17.9	22,675	671	3.0	23,919	7,673	32.1
Adams	868	255	29.4	414	62	15.0	454	193	42.5
Alcorn	466	29	6.2	306	9	2.3	80	20	25.0
Amite	268	46	17.2	86	0	-	182	46	25.3
Attala	383	65	17.0	149	5	3.4	234	60	25.6
Benton	135	14	10.4	65	1	1.5	70	13	18.6
Bolivar	1,338	496	37.1	291	10	3.4	1,047	486	46.4
Calhoun	322	38	11.8	189	3	1.6	133	35	26.3
Carroll	182	38	20.9	58	2	3.4	124	36	29.0
Chickasaw	392	57	14.5	195	7	3.6	197	50	25.4
Choctaw	135	24	17.8	78	1	1.3	57	23	40.4
Claiborne	208	55	26.4	44	0	-	164	55	33.5
Clarke	312	51	16.3	151	4	2.6	161	47	29.2
Clay	334	52	15.6	143	1	0.7	191	51	26.7
Coahoma	1,029	293	28.5	246	10	4.1	783	283	36.1
Copiah	491	107	21.8	155	4	2.6	336	103	30.6
Covington	287	44	15.3	156	5	3.2	131	39	29.8
DeSoto	694	115	16.6	335	10	3.0	359	105	29.2
Forrest	1,116	168	15.0	693	28	4.0	423	140	33.1
Franklin	117	24	20.5	60	1	1.7	57	23	40.4
George	266	15	5.6	233	5	2.1	33	10	30.3
Greene	174	28	16.1	117	6	5.1	57	22	38.6
Grenada	412	75	18.2	156	6	3.8	256	69	27.0
Hancock	329	23	7.0	274	11	4.0	55	12	21.8
Harrison	3,084	263	8.5	2,379	85	3.6	705	178	25.2
Hinds	4,347	757	17.4	2,001	56	2.8	2,346	701	29.9
Holmes	552	172	31.2	83	4	4.8	469	168	35.8
Humphreys	409	109	26.6	88	2	2.3	321	107	33.3
Issaquena	51	14	27.4	9	0	-	42	14	33.3
Itawamba	207	9	4.3	192	6	3.1	15	3	20.0
Jackson	1,765	119	6.7	1,346	26	1.9	419	93	22.2
Jasper	330	34	10.3	121	4	3.3	209	30	14.4
Jefferson	194	60	30.9	26	0	-	168	60	35.7
Jeff Davis	263	51	19.4	103	4	3.9	160	47	29.4
Jones	943	113	12.0	609	18	3.0	334	95	28.4
Kemper	191	30	15.7	32	2	6.2	159	28	17.6
Lafayette	467	59	12.6	272	3	1.1	195	56	28.7

Page 4
Illegitimacy by County of Residence and Race
Mississippi, 1967

County	Total			White			Nonwhite		
	Live Births	Illegitimate		Live Births	Illegitimate		Live Births	Illegitimate	
		Number	Percent		Number	Percent		Number	Percent
Lamar	257	14	5.4	196	0	-	61	14	23.0
Lauderdale	1,415	249	17.6	748	18	2.4	667	231	34.6
Lawrence	184	34	18.5	97	4	4.1	87	30	34.5
Leake	320	42	13.1	138	4	2.9	182	38	20.9
Lee	968	83	8.6	709	12	1.7	259	71	27.4
Leflore	1,109	275	24.8	348	14	4.0	761	261	34.3
Lincoln	472	75	15.9	256	5	2.0	216	70	32.4
Lowndes	1,123	201	17.9	599	20	3.3	524	181	34.5
Madison	792	234	29.5	174	4	2.3	618	230	37.2
Marion	437	73	16.0	252	8	3.2	205	65	31.7
Marshall	516	126	24.4	129	3	2.3	387	123	31.8
Monroe	674	103	15.3	381	12	3.1	293	91	31.0
Montgomery	256	50	19.5	92	3	3.2	163	47	28.8
Neshoba	365	40	11.0	225	6	2.7	140	34	24.3
Newton	304	49	16.1	137	4	2.9	167	45	26.9
Noxubee	360	108	30.0	66	0	-	294	108	36.7
Oktibbeha	542	100	18.4	274	4	1.4	268	96	35.8
Panola	604	152	25.2	185	6	3.2	419	146	34.8
Pearl River	540	46	8.5	405	9	2.2	135	37	27.4
Perry	184	18	9.8	115	5	4.3	69	13	18.8
Pike	553	97	17.5	230	8	3.5	323	89	27.6
Pontotoc	278	27	9.7	209	6	2.9	69	21	30.4
Prentiss	336	20	6.0	284	7	2.5	52	13	25.0
Quitman	474	119	25.1	133	3	2.2	341	116	34.0
Rankin	709	72	10.2	476	7	1.5	233	65	27.9
Scott	465	46	9.9	253	3	1.2	212	43	20.3
Sharkey	255	68	26.7	54	3	5.6	201	65	32.3
Simpson	390	50	12.8	218	7	3.2	172	43	25.0
Smith	260	47	18.1	134	5	3.7	126	42	33.3
Stone	130	13	10.0	78	3	3.8	52	10	19.2
Sunflower	951	280	29.4	178	7	3.9	773	273	35.3
Tallahatchie	529	170	32.1	109	6	5.5	420	164	39.0
Tate	421	95	22.6	147	1	0.7	274	94	34.3
Tippah	300	28	9.3	230	11	4.8	70	17	24.3
Tishomingo	233	14	6.0	215	8	3.7	18	6	33.3
Tunica	387	100	25.8	61	0	-	326	100	30.7
Union	345	37	10.7	248	5	2.0	97	32	33.0
Walthall	268	44	16.4	99	2	2.0	169	42	24.8
Warren	909	164	18.0	453	9	2.0	456	155	34.0
Washington	1,851	486	26.2	586	13	2.2	1,265	473	37.4
Wayne	327	48	14.7	184	5	2.7	143	43	30.1
Webster	162	12	7.4	100	0	-	62	12	19.4
Wilkinson	231	47	20.3	58	2	3.4	173	45	26.0
Winston	378	78	20.6	153	2	1.3	225	76	33.8
Yalobusha	250	43	17.2	102	1	1.0	148	42	28.4
Yazoo	699	165	23.6	221	5	2.3	478	160	33.5

TESTIMONY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

(Title Omitted in Printing)

TESTIMONY OF GEORGE FERRIS PETTEY
FOR DEFENDANTS

The following proceedings were had in the United States District Court, Northern District of Mississippi, on March 16, 1973, before the Honorable William C. Keady, Chief Judge, at Greenville, Mississippi.

* * *

[2] GEORGE FERRIS PETTY (FOR DEFENDANTS), being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Terney:

Q. State your name for the record, please. A. George Ferris Pettey.

Q. Mr. Pettey, are you one of the defendants in this action? A. Yes.

Q. What is your position with the Drew school district? A. Superintendent of the district.

Q. And how long have you been the superintendent of the Drew school district? A. This is the third year.

Q. Prior to coming to Drew in this capacity, where were you employed? A. Tunica County schools.

[3] Q. In what capacity? A. Superintendent, Title I coordinator and high school principal.

Q. Over what time period? A. Six years.

Q. How long have you been engaged in the educational field? A. Approximately 24 or 25 years.

Q. And in a capacity from teaching all the way up to administrative superintendent? A. Yes.

Q. What is your educational background, Mr. Pettey? A. I have a bachelor of arts degree from Mississippi College, a master of arts degree from Teachers College, Columbia University.

Q. Mr. Pettey, what is the rule in the Drew Municipal Separate School District concerning employment of teachers that are unmarried and have children? A. The policy followed by me in recommending teachers to the school board for employment is that no applicant, whether male or female, who has been a parent of an illegitimate child would be considered for recommendation.

Q. The policy, then, touches upon the [4] illegitimacy of the child, not the present marital status of the applicant? A. Yes.

Q. In other words, if a divorced parent of a child came and made application, would that applicant be denied employment because he was not married? A. No.

Q. How long has this been the rule in the system?

The Court: Is this in writing, Mr. Pettey?

The Witness: No, sir.

Mr. Terney: I didn't understand the question, Your Honor.

The Court: Was it in writing. He said it was oral.

Mr. Terney: Right.

Q. How long has this been the rule in the Drew school district? A. I can't say. This is my rule, it is not the rule of the school board, as such.

The Court: [5] They have never adopted it as a rule?

The Witness: No, sir.

Mr. Terney:

Q. This has been your rule since you have been in Drew for the last three years in considering teachers for employment, is that right? A. Yes. As long as I have had anything to do with the employment of teacher personnel.

Q. Did you bring this rule with you from Tunica? A. Well, I think it has been a part of my own employment practices ever since I have had anything to do with it, but, of course, it was in Tunica before then.

Q. Is Mrs. McCorkle employed in the school district? A. Yes.

Q. In what capacity?

The Court: Excuse me.

Does the rule relate to teachers' aides, or teachers, or administrators, or who?

The Witness: Any personnel who have direct instructional responsibilities with the children.

[6] The Court: All right.

Mr. Terney:

Q. Well, let me explore the rule, then, at this point. Is this rule applied to males and females equally? A. Yes.

Q. To blacks and whites equally? A. Yes.

Q. To teachers and teachers' aides equally? A. Yes.

The Court: What about to a janitor? Or a maid?

The Witness: No, sir, I don't think we have applied it there.

The Court: What about a cafeteria operator, a dietitian?

The Witness: Well, I wouldn't knowingly employ one. An individual who was—had that responsibility of preparing food or any capacity where there was considerable responsibility.

The Court: All right.

[7] Mr. Terney:

Q. Mr. Pettey, what is the reason for this rule? A. As it pertains to those who have direct contact with children, I think it has been traditional in education that those who would teach, those who would direct the development of children or, in effect, mold their character or their development should be models or examples that children might pattern their lives after or look up to. And I think that this somehow has been left along the trail somewhere in a lot of school districts. But I still think it is just as important as it has been, and in our particular situation I think it is even more important now than in the past because of the reports by people who are doing research—sociologists, educators, social workers—who say that one of the most critical needs of minority disadvantaged children is a model that they can look up to or pattern their lives after that will help to overcome the conditions that have created the poverty cycle and to create in the child a self image that will enable him to have higher ambitions, to expect more of himself, to improve his own self image.

Q. What problems exist in the Drew school district, or have existed in the past, to make you formulate a rule such as this and enforce it? [8] A. Well, as I say, I think it has merely been a traditional practice by school administrators that I am acquainted with that a teacher or teacher aide, other people who have the responsibility of working with children deliberately should have good moral character. In fact, the application prescribed by state law for a teacher certificate requires that a superintendent or the dean of the school of education or major professor attest to the good moral character of the person applying for that license. And I think this has just been accepted, it has just been a part of the practices or the

policies whether written or unwritten, that school administrators have followed.

Now, as it applies in our local situation in Drew, we have had in the last two years—well, I have records of the last two years, and the condition existed before that—I think an alarming number of school girl pregnancies in our school. We only have an enrollment of around 1200 in grades one through twelve. The number of female children of childbearing age would be less than half that number, and yet in 1971-72 we had 28 girls, ranging in age from 13 to 17, who dropped out of school because of pregnancy. This year we have had 13 who have dropped out, ranging in ages from 11 to 18. I think this is a problem that we as school people, responsible for the development of children, should try to do something about. And I think [9] the responsibility of teachers or aides or any school personnel who are dealing directly with the children and who should serve as models is more than just intellectual development. I think we have a responsibility to create a moral climate, moral environment that will help that child to develop in ways that will be in their own best interest.

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[15] *Cross-Examination*

Q. You have kept abreast with recent publications by the teachers college dealing specifically with unwed motherhood? A. No, I haven't.

Q. Are you aware of public documents put forth dealing with the question of unwed parents? A. No.

Q. With unwed students? A. No.

Q. Dealing with the question of the suitability of unwed teachers at all? A. No.

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[16] The Court: I believe he said, Counsel, that this policy was one of his and not the school board, and he wouldn't recommend one. Is that correct?

The Witness: Yes, sir.

The Court: The school board has never taken any action, as such, on the problem?

The Witness: [17] No, sir.

Mr. McTeer: Thank you, Your Honor.

The Court: Have you ever discussed the policy with the school board?

The Witness: I have discussed it with the board since this case was filed. They do concur and—

The Court: All right. They ratified the policy, then?

The Witness: Yes, sir.

The Court: Very well.

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[19] Q. But right now we are talking about Katie Mae Andrews and Listme Rogers, who the only reason for your deciding they were unfit was the basis that they were unwed mothers. I would like to get a little more information as to exactly what crystallizes this point of view that you have. A. I think I have pretty well already answered that, but I will answer it again.

Q. Good. A. It's my feeling from the very beginning of my experience in teaching, or, in fact, in preparing for teaching that teachers' responsibilities go further than two covers of a book and four walls of a room. Teachers share responsibility along with other school personnel for providing an environment which is conducive to the moral development as well as the intellectual development of those with whom they are charged with the responsibility for developing.

Q. So I take it, Mr. Pettey, that a person who supposedly has a, quote, illegitimate child, as you put it,

that fact, no matter when it took place or no matter under what circumstances it took place, is prima facie evidence of [20] a lack of morality? A. It would be to me, yes.

Q. All right. Very good.

Now, let's find out exactly how expansive this marvelous rule of yours is. All right? Now, if I have a child, if I am a woman, conceive of that, if I am a woman—right?—and I had a child three years ago, all right, and I come to you for a job and I am not married, would I be given employment? A. You would not.

Q. All right.

Now, if I had a child three years ago and got married today and then came to you for a job, would I be employed? A. You were not married at the time of the birth of the child?

Q. I was not married at the time. A. You would not be employed.

Q. Wait a minute now. Let's understand this rule. Haven't I fulfilled society's guidelines of morality that you have set forth or am I forever banned? A. You are talking about society.

Q. I am talking about you. It is your rule.

The Court: Let's go back. Suppose a woman had an [21] illegitimate child and then later married either the father of the child or another man. When she presented herself to you she showed she was married and had a child, one child. Would you consider her for employment?

The Witness: No, sir, I would not.

The Court: You would not consider her?

The Witness: No, sir.

The Court: All right.

Mr. McTeer: Your Honor, excuse me, I am having a slight hearing defect. I couldn't hear that exchange.

The Court: Read it back, Mr. Court Reporter.

(Whereupon, the Court Reporter read the exchange.)

Mr. McTeer: Thank you.

Q. Now, earlier in testimony on direct you talked specifically about models and examples. I think that is a very exemplary goal. Let's talk about the different jobs that are available for people in the school [22] district and talk about the direct administration and try to extend your particular analogy to the nth degree. Now, of course, this extends to teachers, correct? A. Yes.

Q. Teacher aides? A. Yes.

Q. Librarians? A. Yes.

Q. Extends to gym teachers? A. Yes.

Q. Would it extend to a cafeteria worker? A. Yes. I have never had that to occur, but I think it would, yes.

Q. What about a secretary? A. Yes.

Q. A janitor? A. I'm not sure about janitors.

Q. Why not? A janitor runs into the children each day. I think each one of us can remember some janitor who gave us candy or was close to us. Would it extend to a janitor? A. I don't know. It hasn't occurred and I haven't made that decision yet.

Q. Would it extend to a bus driver? A. (No response)

[23] Q. A school bus driver? A. I can't say.

Q. Would it extend to a nurse? A. Yes.

Q. And a social worker? A. Well, if we had social workers.

Q. Principal? A. Yes.

Q. A party who volunteers to do school work or to work with teachers? A. If we had those, it would, yes.

Q. Would you object to a PTA president on the basis of his unwed parenthood? A. I would.

Q. And you would make all these objections only on the basis that these particular parties would be considered the father or the mother of an illegitimate child? A. Yes.

Q. You said earlier in your direct testimony there was an alarming number of schoolgirl pregnancies, right? A. Right.

Q. Okay.

Can you show me any direct relationship [24] between schoolgirl pregnancies and unwed teachers? A. No.

Q. So this is really a presumption on your part that if you take an unwed mother and put her in a classroom that is going to breed unwed schoolgirls, correct? A. I don't know whether it's a presumption. I don't have any scientific basis for it.

Q. Indeed, you said earlier that you did have a scientific basis for it. Earlier, on direct testimony, you said specifically the fact that there was sociological evidence to the effect that the morality of students would be affected in said situation. A. No, I didn't.

Q. You did not? A. No.

Q. Very good.

Let's be honest with each other. Isn't it easier to find an unwed mother than an unwed father? A. Oh, yes.

Q. Why? A. Because the unwed mother is stuck with the result.

Q. I see.

Now, you have implemented a policy which Mrs. McCorkle has been the, quote, executor of, is that [25] correct? A. Yes.

Q. And Mrs. McCorkle has been advised by you to implement that policy as she sees fit, correct? A. Yes.

Q. Have you ever warned her of this extreme difficulty in finding the unwed father? A. No.

Q. Have you ever told her that she may have to investigate to the nth degree to find an unwed father? A. No.

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[27] Q. Now, you have said that the actions of a person in having an illegitimate child are immoral. A. Yes.

Q. Why? A. Well, I think the majority of the people have determined that. Morality is determined by the majorities.

Q. How many black people in your school district? A. Oh, I think we have around 11—wait a minute. Around a thousand, I suppose.

Q. What percentage of your school is black? A. About 30 percent.

Q. Do you know what the figures are among black people for illegitimate births? A. I think 30 to 40 percent.

Q. Do you know what the figures are for white people? A. Oh, about half that.

Q. That is illegitimate live births, correct? [28] A. Right.

Q. Isn't this really an imposition upon a community of your morality? A. I think not.

Q. You think not. You think that the rule which you have carried, as you said, all of your educational career from Tunica as a superintendent, you think that this rule is indeed necessary for the development of a school district, is that correct? A. For the discharge of the school district's responsibility to its children, yes.

The Court: Mr. Pettey, you do not think the facts or circumstances under which an illegitimate birth occurred is at all relevant to the issue of good character or bad character?

The Witness: No, sir. That would be hard to get at. I think the fact that the birth occurred without the benefit of matrimony is, to me, proof enough of the—

The Court: Is conclusive?

The Witness: Yes, sir.

The Court: [29] All right.

Mr. McTeer:

Q. I want to know why you have such strong feelings about unwed parents. Let me ask you this question. Have you done any investigation on homosexuality? A. I have not.

Q. Have you instructed the director, Mrs. McCorkle, that she is not to hire any homosexuals? A. I have not.

Q. Have you instructed her she is not to hire sexual deviates? A. No.

Q. Have you instructed her she is not to hire individuals who have been convicted of criminal acts? A. No.

Q. Only unwed mothers? A. Yes.

Q. Why? Why do you choose the unwed mother? Have you had an unwed mother in your family? A. Because this is the first time an applicant has had the audacity to apply who had this marital status.

Q. How do you know? A. Well, from the records, then, I will say. We may have had a dozen as far as I know.

Q. But you have said already, and Mrs. McCorkle [30] has said already, there was never any investigation. She didn't know that was the rule. A. That's right.

Q. Now, how do you know that you have never had an applicant? A. Well, I haven't recommended one knowingly, then. Perhaps there have been applicants and I didn't know about them. But we do know about these.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

(Title Omitted in Printing)

The following proceedings were had in the United States District Court, Northern District of Mississippi, on March 16, 1973, before the Honorable William C. Keady, Chief Judge, at Greenville, Mississippi.

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MRS. FRED McCORKLE (FOR DEFENDANTS)

[5] *Direct Examination*

By Mr. Terney:

Q. Would you state your name, please, for the record. A. Mrs. Fred McCorkle.

Q. Mrs. McCorkle, where do you live? A. In Drew, Mississippi.

Q. And where are you employed? A. In the Drew Municipal Separate School District.

Q. What is your title or what is your employment there? A. Coordinator of Elementary Instruction.

Q. Is that under the Title I program? A. Yes.

Q. Mrs. McCorkle, how long have you been so employed by the Drew Municipal Separate School District? A. Three years.

Q. What are your duties with the Drew Municipal Separate School District? A. I am in charge of the aide program and I also supervise teaching in the first two grades.

Q. Do you handle the employment of the teacher aides within the school district? [6] A. I recommend who shall be hired.

Q. Now, what is the procedure when an individual comes in to make application for a position as a teacher's aide in Drew? A. I have them fill out an application, and then I investigate and ask other people who know about them, and then I recommend to the Superintendent—to the Principal and then to the Superintendent.

Q. You make a recommendation whether that particular individual be employed? A. Yes.

The Court: Your recommendations go to whom, ma'am?

The Witness: They go to the Superintendent.

The Court: All right.

Mr. Terney:

Q. Is the application that is made by an individual for employment a written application? A. Yes.

Q. Do you finish the form that they fill out? A. Yes.

Q. Do you do this in every case of teacher aides? [7] A. Yes, every one fills out an application.

Q. Do you personally review these applications and make an investigation on the individual involved? A. Yes.

Q. At times, have you failed to act on applications? A. (No response)

Q. At times, have you failed to recommend individuals who made applications for positions of employment? A. Yes.

Q. Did you have occasion to take the application of one of the plaintiffs in this, Katie Mae Andrews? A. Yes.

Q. When was that, Mrs. McCorkle? A. The application is dated 12-18-72.

Q. Did she make a written application with you? A. Yes.

Q. For what position? A. A teacher's aide.

Q. Did you have a personal conference with her? A. Yes.

The Court: What academic training was required for [8] teacher aides by the Drew schools?

The Witness: They must be at least a high school graduate.

The Court: All right.

Mr. Terney:

Q. What duties or functions does a teacher's aide engage in in the Drew School District? What, actually, does a teacher's aide do? A. She assists the teacher. She is under the teacher's direction. Whatever activities the teacher wants her to carry on she explains to her and she carries them on in the classroom. The aide also has charge of the children during the recess and noon hours.

Q. Then they do have personal contact with the children, is that correct? A. Yes.

Q. How many such teacher aides are presently employed within the Drew school system? A. Thirty-three.

Q. Now, how is the salary for a teacher's aide determined? A. It depends upon the amount of education that they have.

Q. What is the lowest salary? [9] A. High school graduates are paid 250 a month.

Q. Two hundred fifty dollars per month? A. That's right.

Q. What is the highest salary paid? A. Four hundred fifty per month.

Q. Who qualifies for that salary? A. A college graduate.

Q. And what about the in-between salary range? A. They receive increments of $50 for every year of training, college training.

Q. College.

Customarily, when are these teacher aides contracted with for employment? A. In August.

Q. Immediately preceding the school year? A. That's right.

Q. Are they employed on a one-year basis? A. That's right.

Q. From a year-to-year basis? A. That's right.

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[11] Q. Now, Mrs. McCorkle, the application that has now been introduced into evidence, you stated this is the original application of Katie Mae Andrews, is that correct? A. It is.

Q. Who filled out the information on the basis of the application? [12] A. Katie Mae Andrews.

Q. Did she also sign and date this application? A. She did.

Q. Was this done in your presence? A. Yes.

Q. After her application was submitted to you, what did you advise her at that initial meeting with her as to her employment or possibility of employment? A. I told her that I would investigate. And I did.

Q. Do you customarily do this for every applicant? A. Yes.

Q. Do you make a personal interview? A. Yes.

Q. What does this investigation consist of? A. I generally consult with other members of the staff, ask their opinion as to whether or not I should hire. I always go to the Principal.

Q. If they personally know these individuals? A. Yes.

Q. Did you do this with Katie Mae Andrews? A. Yes.

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[13] Q. Now, what did your examination of Katie Mae Andrews reveal after the application was filed with you? A. I learned that she had a child.

Q. A child out of wedlock? A. Yes.

Q. What did you then do with her application? A. I just put it back in the file.

[14] Q. Did you fail to consider it any further? A. I did not consider it further.

Q. Why? A. Because the policy of the school would not let me consider her when she was unmarried.

Q. What is the policy of the school district? A. We do not hire unwed parents.

Q. Is there any other reason you failed to act on this application? A. No.

Q. Did you discuss this with the Superintendent? A. No.

Q. So you just failed to act on the application because of the rule of the school district? A. It was the policy of the school.

Q. All right.

Did Katie Mae Andrews subsequently contact you? A. Yes.

Q. Now, when was that? A. I don't remember the date.

Q. Was it during the month of January 1973? A. Yes.

Q. Did she come to your office, or contact you by telephone or how? [15] A. She called me on the telephone.

Q. What did you advise— A. Later she came to the office.

Q. You just asked her to come to your office? A. She came to the office of the Principal.

Q. All right.

Did you meet with her? A. Yes.

Q. What was the purpose of her visit? A. She wanted to ask about her application.

Q. Did she ask you about the application? A. Yes.

Q. What did she tell you? What did she ask you? A. She said she wanted to apply for a job, and I told her that I could not consider her because she was an unwed parent.

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[18] Q. Have you also had occasion to have a conference with the other plaintiff in this matter, Lestine Rogers? A. Not since last spring.

Q. Was she employed by the Drew school system at that time? A. At that time, she was.

Q. For how many years was she employed by the school district? A. One year.

Q. Was that '71-'72 school year? A. Yes.

Q. Last year? A. Last year.

Q. Did you recommend her for employment? A. For the next year?

Q. No, ma'am. For the first year. A. Yes.

Q. She made application in the normal procedure, and you recommended her for employment? A. That's right.

[19] The Court: Was she a teacher's aide too?

The Witness: Yes, she was a teacher's aide.

Mr. Terney:

Q. And did she fill out her contract for the year as a teacher's aide the last year? A. Yes, last year.

Q. What was her salary? A. Two hundred fifty dollars per month for nine months.

Q. What was her educational level? A. High school.

Q. High school graduate? A. That's right.

Q. Did you recommend her for employment for the 1972-'73 school year, the current school year? A. I did not.

Q. Why? A. The Superintendent explained the policy that we do not hire unmarried parents, therefore I did not recommend her to be rehired.

Q. When was this done, Mrs. McCorkle? A. In the spring of last year, before school was out.

[20] Q. You advised her at that time that she would not be employed for the coming school year, for the present school year? A. That's right.

Q. Did her application indicate that she was an unmarried parent? A. Yes. She says, "Single." And number of children: "One."

Q. When was this policy of the school district explained to you? A. Last spring.

Q. By whom? A. The Superintendent, Mr. Pettey.

The Court: You had not had such a policy before?

The Witness: I had not been told of the policy. That is the first I knew of the policy.

The Court: All right.

Mr. Terney:

Q. Did you personally advise Listine Rogers that she would not be employed, then, for the '72-'73 school year? A. Yes, I did.

[21] Q. All right.

Did you know how many illegitimate children she had at that time? A. Her application said one.

The Court: Well, now, would that indicate it was an illegitimate child? Do you have a space on there for divorced? How does your application read? May I see that?

* * *

[23] Q. Do you know whether or not plaintiff Lestine Rogers has subsequently had any other children? A. I heard from several sources that she has another child.

Q. That you were not aware of at the time you advised her that she would not be employed? A. No, I did not know it then.

Q. Now, on Katie Mae Andrews' application, did you make any notations on that application yourself? A. Yes. I wrote on there, "She has a child. Single with a child." And I have three or four. The child is about three or four years old.

Q. Now, these notations on that application [24] are yours? A. They are mine. They are made with pencil.

Q. When did you make those marks or lettering on there? A. When I was investigating.

Q. All right.

Is there anything on the back of that application? A. Yes.

Q. Now, who did the writing on the back of the application? A. I did.

Q. Could you read that, please. A. "This applicant would have been hired in January 1973 if I had not received information from Mrs. Clara Robertson and others at the James Elementary School that she had a child. The applicant stated on the application that she was single and had no children. When she called by phone in January, I informed her of the school policy and have had no contact with the applicant since then."

Q. Now, this is your writing, is that correct? A. That's right.

Q. When did you add that on the application? A. (No response)

[25] Q. It was done during the course of or at the conclusion of your investigation? A. That's right.

Q. Would you recommend for employment an individual who made a material misrepresentation on an application? A. I would not.

Q. Do you consider the fact that Katie Mae Andrews indicated she did not have a child when in fact she did a material misrepresentation? A. I consider it a misrepresentation.

Q. If the school district did not have this policy considering unwed parents and this applicant had made a material misrepresentation on her application, would you recommend her for employment? A. I would not.

Q. I believe you testified earlier there are presently no vacancies in the system for teacher aides. Is that correct? A. That's correct.

Q. Mrs. McCorkle, when you state that the policy of the school district is to the effect that it will not employ an unmarried parent, now, as you implement this policy, how do you consider in the light of this rule a divorced parent? [26] A. The occasion has never come up, so I haven't had to—

Q. Would you recommend for employment a person that is divorced but in fact has a child? A. I would have to get the ruling of the Superintendent on that, because he sets policy.

* * *

Cross-Examination

[35] Q. What church are you a member of?

The Witness: Drew Baptist Church.

Mr. McTeer:

Q. Is that an integrated church? A. No.

Q. Do any black people go there? A. No.

Q. Are you a member of any social club that has black people as members? A. No.

Q. How do you find out this information, Mrs. McCorkle? A. I go to others on the administrative staff at the school.

Q. You do what? [36] A. I ask the other staff members in the school.

Q. That would be other teachers, other administrators? A. Principals.

The Court: Is the faculty integrated?

The Witness; Yes, the faculty is integrated.

The Court: All right.

Mr. McTeer:

Q. Now, when Miss Katie Mae Andrews made her application, you said you talked to someone by the name of Miss Clara Robertson, is that correct? A. That's right.

Q. Who is Clara Robertson? A. She was an elementary supervisor.

Q. Is she black or white? A. She is black.

Q. Exactly, when you talked to Miss Robertson and you had a conversation, et cetera, you asked her specifically whether or not Katie Mae Andrews had a child and was not married, is that correct? A. I did not ask about the child. I asked her [37] for her recommendation in regard to whether or not I should hire her.

Q. I see. And at that time she told you that Miss Andrews had a child and was not married, is that correct? A. That's correct.

Q. Did you check to find out whether or not that was true? A. I asked other people, and they knew that Miss Andrews—

Q. Who else did you ask? A. I do not remember.

Q. You don't remember.

Mr. Terney: Your Honor, we object to that. I think the pleadings themselves admit the plaintiff—

The Court: Is that an issue in the case? Whether this Miss Andrews is the mother of a child? Is that in issue?

Mr. McTeer: No, it is not.

The Court: Well, it seems to me like you are going afield.

Mr. McTeer:

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[40] Q. When men are hired for these particular teacher aide positions and you are about to make your investigation, do you make the same type of investigation as you make for a woman? A. Yes.

Q. All right.

Now, how do you go about making this investigation? Exactly what would you do in order to make this investigation? A. I go to the Principal first and ask his recommendation.

Q. And then? A. Then I have been to the principal of the high school and the principal of the junior high school on occasions.

Q. Do you know how many people—male or female—have been denied employment at the Drew Municipal Separate School District because they are unwed parents? A. No, I do not know.

Q. All right.

Do you know how many women have been denied employment because they were unwed parents? [41] A. No, I cannot tell you that.

Q. Do you know how many men have been denied employment? A. I cannot tell you that.

Q. Do you know who Miss Betty Barnes is? A. I have seen her.

Q. All right.

Was Miss Betty Barnes denied employment because of her unwed parent status? A. Yes.

Q. I see.

Now, can you give me the name of a man who was denied employment because of his unwed parent status? A. No, I cannot.

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[42] Q. Do you know a Miss Violet Burnett? A. Yes, I do.

Q. Was she denied employment because of the fact she was an unwed parent? A. Her contract was not renewed.

Q. Because of what reason? A. Because she was an unwed parent.

The Court: What was that name, Counsel?

Mr. McTeer: Violet Burnett.

Q. Do you know Miss Rosie Mays? A. Rosie Dean Mays?

Q. That's correct. A. Yes, I know her.

Q. Was she denied employment because of her unwed parent status? A. She had worked on her contract. She was not given a new contract because of her unwed status.

Q. Now, once again I ask you, do you know the [43] name of a man who has been denied employment because of his unwed parent status? A. No, I do not.

Q. Very good.

Now, when Miss Katie Mae Andrews came to see you on the 18th of December—that is correct, is it not? A. That is what the application says.

Q. All right.

When she came to see you at that time, was there a vacancy open as a teacher's aide? A. Yes, there was.

Q. Since that time that vacancy has been filled? A. It has.

Q. Who has it been filled by? A. Mrs. Georgeanne Ward.

Q. Is she white or black? A. She's white.

Q. I see.

Now, you make, you say, a complete investigation of every person that comes before you who is making an application for a job as a teacher's aide, correct? A.

I do not investigate every person. I [44] investigate those that I think I might hire. Some I do not consider because I start with those who have the most college training.

Q. Okay. Those who have the most college training.

But yet, you chose to investigate Miss Katie Mae Andrews, who on the face of her application made a statement that she was a college graduate. Why did you choose to investigate her application? A. Because I had a vacancy at the time for which I was going to consider her.

Q. I see.

Now, have you ever fired or caused to be discharged a white woman on the basis of her unwed parent status? A. I have not.

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[45] Q. Let me ask you a question, Mrs. McCorkle. You made note of the fact earlier that Miss Lestine Rogers was hired on the basis of the application which is now Defendants' Exhibit Number Two, is that correct? A. That's correct.

Q. Now, this application was made out in August, you said, prior to this time, August of 1971. Is that correct? A. She worked last year in the school system and it was filed prior to last year.

Q. So that would be before September of 1971, correct? A. (Witness moved head up and down)

Q. Thank you.

Now, it says here in this application that she was single and she had a child. Is that correct? A. That's correct.

Q. But at that time the school district didn't seem to have a policy that an unwed mother could not be hired, is that correct? A. I had not been informed of the policy.

Q. You had not been informed of that. But you were so informed when? A. Last spring, before school was out.

Q. Who were you informed by? [46] A. The Superintendent.

Q. Mr. Pettey so informed you? A. Mr. Pettey.

Q. Okay.

Now, how did you specifically find out that Miss Lestine Rogers had a child? A. I don't remember.

Q. I see.

Did you make an investigation of every teacher aide in the school district? A. Yes.

Q. You did? You made an investigation of every one? A. (Witness moved head up and down)

Q. And the only one you came up with was Miss Lestine Rogers? A. There were two others.

Q. And the other two were fired. Who were the other two? A. Violet Burnett and Rosie Dean Mays.

Q. Okay. Very good.

The Court: That was after the new policy came into effect?

The Witness: Yes.

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[52] *Recross-Examination*

By Mr. McTeer:

Q. Mrs. McCorkle, on redirect you just stated that there are no males in the school system who have illegitimate children. A. In the aide program.

Q. Oh, no males in the aide program. All right. How do you know that? A. I only have one male aide.

Q. Is he white or black? A. He is black.

Q. How do you know he doesn't have any illegitimate children? A. He is married.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

(Title Omitted in Printing)

TESTIMONY OF RONALD G. SAMUDA

The following proceedings were had in the United States District Court, Northern District of Mississippi, before the Honorable William C. Keady, Chief Judge, on March 19, 1973, at Greenville, Mississippi.

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[3] RONALD G. SAMUDA (FOR PLAINTIFFS), being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McTeer:

Q. Mr. Samuda, would you please state your full name. A. Ronald G. Samuda.

Q. Who are you employed by? A. Columbia Teachers College.

Q. Very good. What is your position with that institution? A. Assistant Dean for Program Development, Associate Professor of Education, and Director of the Center for Ethnic and Urban Studies.

Q. Very good.

Doctor, would you please give me a few of your, quote, educational credentials, please. A. Well, I have a number of certificates. One from England, about three or four from Canada, I am a member of the American Psychological Association, of the American Educational Research Association and a number of [4] other different professional organizations, such as the Canadian College of Teachers. I hold a doctoral degree in education, teacher

education in particular, I have been practicing for about 25 years in various countries. I did a post doctoral fellowship at Stanford University in behavioral psychology. I have also recently been the Director of the Institute for the Assessment and Guidance of Minorities at the Educational Testing Service at Princeton.

Q. Mr. Samuda, have you published any recent publications? A. Yes, I have. I have written concerning the impact of cybernetics on counseling, I am in the process of preparing four volumes, one which deals directly with the education of minorities. And also, I am very much involved in the business of testing, attempting to make testing more facilitative for the education of blacks, Puerto Ricans and Chicanos.

Mr. McTeer: Your Honor, on the basis of that testimony, I would like to qualify Mr. Samuda as an educational sociological expert.

The Court: Do you have any questions on voir dire?

Mr. Terney: [5] No questions.

The Court: All right.

You may treat him as such.

Mr. McTeer:

Q. Dr. Samuda, does unwed parenthood or unwed motherhood have anything to do with the so-called moral condition of the said unwed mother or unwed parent? A. Well, I would like—I am going to answer, and I would like to qualify that or speak to it. First of all, when we speak about moral condition, in my opinion we are inferring certain value patterns or a lack of moral values which are inconsistent with the sanctions of society. Again my opinion, having a child is not a moral event, it is a biological and physiological fact. Therefore, the objection to a teacher practicing in a classroom who is an unwed mother is related not to the fact that she has had a child but to the fact that she has committed a

sexual act which preceded the birth of the child. But if we say then that a person who cohabits or who has had sexual intercourse, that is to say, premarital sex or extramarital sex, is an immoral person, then we would also be condemning a great majority of the practicing teachers throughout the country who indeed have participated in extramarital sex. In fact, Kinsey has shown that premarital sex and extramarital [6] sex is far more frequent and far more extensive amongst the upper middle class than it is amongst the working class. In fact, that the moral values of the working class, and particularly of black communities, are far more rigid than that of the upper middle class. Therefore, my point is that there is no correlation between having borne a child and teaching. What one is talking about is the intermediary, that is, the sexual act.

Now, there is another point that I would like to make here. And that is if we say then that middle class girls cohabit and that working class and black people cohabit, they are doing the same thing, what is lacking? What is the difference? The difference is in the fact of contraception or the difference might be in the fact of abortion. So we are really talking about the moral condition of abortion and of contraception or the intermediary between the sexual act and the bearing of a child.

Q. Thank you very much.

In your opinion, Doctor, should unwed motherhood or unwed parenthood have anything to do with the direct ability to teach or with the presentation of a proper image before students? A. Again, I am of the opinion that it has nothing at all to do with a person's competence to teach. We have to make a distinction between the word model and [7] the process of modeling as determined, for example, by Babdura. It is true that if a person who represents a prestigious figure were to practice

certain acts in the classroom that this would represent modeling. But what we are talking about here is inferential rather than direct. The fact that a woman has a child means that she may have cohabited once in her life and has borne that child. If it could be shown that this person were proselytizing the fact of extramarital affairs, et cetera, then this would be overt behavior. But we are not talking about overt behavior, we are talking here about inferential value systems.

Q. Now, you have heard of the rule of the Drew Municipal Separate School District saying that under no conditions shall an unwed parent, or, as has been more often the case, an unwed mother, be allowed to teach. Could you please tell me your personal opinion of the educational viability of such a rule. A. Quite frankly, it—I'm flabbergasted that such a thing should be wrought to this point because it is patently absurd, in my opinion. It is not a viable consideration based upon any of the works that I have been reading, particularly recently. In fact, this is exactly the position that the women's liberation are taking, that a woman has the right to control her own behavior, providing [8] her behavior is not impingeing upon the rights of other people. Now, the inference here is that a woman must abide by a particular moral code which has been set down by somebody who is external to her. The only relationship between her behavior is if it impinges upon the lives and the value systems of those children in her charge.

Now, I have just been reading before I came, on the plane down here, one of the rather more extensively known books in which even if one attempted directly to teach values it does not get across in the classroom.

Q. Would you explain that more fully. A. Values are taught in the home. Values essentially are laid down in the home. And it is an extremely difficult thing, al-

most an impossible thing—we have a negligible effect when we attempt to teach values directly in the classroom. Because the value system, the physiological makeup, the mental set of the child is determined not by the school essentially but by the home. And if one even wanted, if someone came to me and said, "Now, I want to set up a system or program in which we would teach these values," I could not just place a person and infer from the fact that this kind of person has certain attributes or has done certain things or has certain value patterns and expect that the children are [9] going to get this. Even if I wanted to, it wouldn't happen. So what we are talking about then is the effect of schooling on the values and attitudes of children. The piece I am quoting here is Remmers Radler, The American Teenager, pages 210 to 216, in which they contend that the basic patterns and beliefs are not usually established by schools, nor are they readily changed by schools. The home is the place where morals are developed. And Monahan has also shown that the frequency and extent of sexuality among—as I said, I want to repeat this fact because I think it is important—among the middle class is far greater than that amongst the working class. And that, as I said before, that amongst the black population there is a far more rigid code. The point I want to make here is that the moral value is being placed, in my opinion, in this particular controversy, not upon the fact of childbirth but upon the intermediary between sexuality and childbirth, namely that of contraception or abortion, and therefore, in my opinion, it is an absurd position.

Q. Let me ask you this question. In terms of the rule itself there has been testimony to the effect that the rule was created in order to create a proper image for black children. Is it possible to infer that this rule, in fact, is detrimental to the best interests of black chil-

dren in a situation where a majority or a large [10] number of those children, say a third or more, a large number of those children come from homes with a matriarch or come from homes which have an unwed parent?

A. Well, as a matter of fact, I think that to infer that a teacher must be a middle class person could almost be psychologically detrimental to black children. Because what you are really doing is introducing a foreign, an alien value system. There are differences between the value system of black children and that of white children, and these have historical antecedents. It is based upon the fact of slavery. Where does the matriarchal society come from? Why? Is it a natural and ordinary, an African thing? In my opinion, it is not. Africans have a very, very strict code of morals. What has occurred in the interim is that as a result of slavery the male slaves were deliberately taken away from the family, and this was done in order to prevent unity. And also, the tribal groups were broken up, the family was broken up and males were deliberately removed from the family so that there would not be rebellion. This was understandable because slavery was a fact. Now, this historical fact, in my opinion, is the reason why you have a sort of matriarchal tendency within the black community.

Now, the point I am trying to make is that there is a kind of value system within the black community, [11] there is another kind of value system within the middle class white community. And these are different. And when you place a white Anglo-Saxon, Protestant, upper middle class person in a classroom to teach black children, you have conflicting values. And, in fact, I think that you would tend to produce an even more psychologically damaging effect than if you have this divergence of class structure.

Q. Hence the real effect of this rule, in essence, to black children is indeed a very damaging one in terms of their personal psychologies? A. In my opinion, to introduce strange and alien values into a classroom is detrimental.

The Court: Do you think, then, the Supreme Court was wrong in Brown versus Board of Education in ordering integration of education?

The Witness: No, I wouldn't go so far as to say that, Your Honor. What I am trying to say is that we need to look at the way in which we are going to organize education in view of the fact that we have tried to be fair. But it's not a simple matter. I don't think we can just suddenly say, "All right, let's put a lot of white teachers into black classrooms and then we can produce this kind of [12] culture." It's not going to happen that way. The black people are a special kind of people. They are almost like a foreign people. I happen to have been born, for example, in Jamaica. There are differences between my value structure and the value structure of my colleagues who are white Americans. This is what I am saying. That there are differences in value and that we must be cognizant of these and, in fact, to attempt to introduce new values can be psychologically damaging to these children.

The Court: All right.

Mr. McTeer:

Q. Dr. Samuda, one last question. In your opinion, would the mere existence within a classroom as a teacher of an unwed mother teach female students or male students to become unwed parents? A. No. That's impossible. Again because it is inferential. Even if one deliberately attempted to do it, it would be impossible. Because there is confusion between the concept or the name model, and model is something like a small airplane or an individual

who is prestigious, that is one thing, the other thing is the process of modeling, which is a part of behavioral psychology. Now, children learn when they see a prestigious person doing something in a classroom or wherever and when [13] they see that person being reinforced or being rewarded for going through those acts. Children then would tend to imitate those acts. Now, if we were talking about overt promiscuity, if we were talking about observable behavior, then I would say that those children would be learning those values. But it seems to me that we are talking about inferences, about inferential—an inferential value system. And in my opinion, if there is no evidence of overt behavior and of the proselytizing of extramarital sex, then I can see no correlation whatsoever between being an unwed mother and being a competent teacher.

Q. Doctor, one last statement. What do you think will be the reaction, what do you think is the reaction of the educational community, the esteemed educational community that you are part of, Columbia Teachers College, to this rule? What do you think that reaction is? A. We would be shocked. We would essentially be shocked. We would be—I think that if such a rule was made it would have very tremendous detrimental repercussions. I think it would become extremely significant as one of the issues which would again show a form of unfairness, because it would repeat a form of discrimination—eventual discrimination. Because if, as I understand it, there are about one-third of the births of [14] black people from unmarried, then it would mean that you are excluding from employment at least one-third of the people who are trying to raise their standards of living, raise their standards of life. And therefore this kind of ruling would be seen, I think, as discriminatory. I am quite sure that my institution and, in fact, the colleagues with

whom I am now associated on national projects would not only be shocked but would begin to protest very vigorously.

Cross-Examination

* * *

[18] Q. If the rule, then, is enforced equally against males and females, how can you say that it is discriminatory against females? A. I don't see how you could enforce such a rule against males, because when a man has a sexual act there is no way to tell whether he has a child of his own [19] or not.

Q. Doctor, the procedure is that an individual seeking employment at the Drew schools fills out an application on which there are questions relating to the marital status and the number of children. Now, if a male teacher is unmarried and indicates so on his application and further indicates that he has a child, this is one method of determining whether or not— A. Well, you see, again in my opinion, a man—when a man makes love to a woman nothing happens to him. It is the woman who bears the child. I mean, it is an obvious fact. She becomes pregnant and she has a child. In other words, it is very easy for a man to lie. In fact, it is even very difficult for a man to verify the fact that he is a father.

* * *

[20] Q. Do you feel that this is solely a moral question that we are talking about here today? A. Well, we are talking, in my opinion, sir, about justice, we are talking about what I consider if this rule were put into effect to be an unjust rule. You know, just because it is making inferences and it is not based upon the observation of behavior. And it is making inferences and it is not based upon the observation of behavior. And it is casting aspersions at the character of a person simply

and solely on the basis of having borne a child, which I feel would be unjust.

Q. Do you feel it is unjust to convict and confine a murderer for one isolated act that he commits?

Mr. McTeer: [21] Your Honor, objection.

The Court: Overruled. I will hear the answer.

The Witness: A murderer?

Mr. Terney:

Q. A murderer or a rapist. A. I don't think there is any relationship whatsoever to what we are talking about.

Q. We are talking about one isolated act. A. No—

Q. Let me ask you this. A. I do not—you see, you are talking there about a crime. I do not consider the fact of sexual intercourse to be a crime, nor do I consider the fact that the woman bears a child to be a crime. Now, you are trying to equate murder with bearing a child. And I think that the difference is so vast that it is an absurdity.

Q. Do you know that in Mississippi illegal cohabitation between two unmarried people is against the law? A. (No response)

Q. It's a state law. A. I don't know that, sir.

Q. All right. So, in order to conceive, the [22] parents, the mother or the father in this case, must have violated the law if they were in Mississippi.

Now, first of all, what is your opinion about whether or not premarital sex is moral or immoral? A. Is premarital sex moral or immoral? I think that is a very difficult thing to answer. I don't think you can say that it is either moral or immoral until you look at the particular circumstances. For example, I believe that there are kinds of marital sex that are immoral. For example, where two people are married and where they hate each

other, where they have reached a point where the marriage has completely broken down, you have a legal condition, but you have a psychological condition which is going to have a detrimental effect upon the children of that marriage. So the concept of morality has to do with a particular case, and which particular case you are talking about, I would have to look at.

Q. You believe in situation ethics? A. Yes, I do.

Q. So you believe we ought to take all our rules and regulations and laws and throw them out the back door— A. No, sir.

Q. —and judge every instance— A. No, sir.

[23] Q. —upon the particular circumstances at the time? A. No, I don't. But I do think that this rule would be a travesty.

Q. Are you familiar with the moral values in this section of the country, of the United States? A. I believe so.

Q. And you have told the Court that in your opinion the black race holds different moral values and standards than the white race? A. Different values. A different set of values, a different set of psychological conditions. And that these psychological conditions have been determined by the historical antecedents of each particular group of people. And that there is a different value system within the white middle class community as opposed to the black community, because the black community has suffered many hundreds of years of slavery.

Q. All right. When you say value system, are you using this also to mean their morals? A. Well, again it depends on what you mean by morals. Values. For example—

Q. Well, now, excuse me, Doctor. You have used both morals and values. I was just trying to get to whether you are using them interchangeably with the same meaning

or [24] if morals means one thing to you and values another. A. Values, in my opinion, is a more comprehensive term than morals. When we talk about morals we are talking about a code that deals with the sanctions of a particular society. When we talk about values, it is a philosophy of life, a way of looking at things. And again in my opinion, the philosophy of the black community has necessarily been one of survival. Survival because of the conditions under which they live. And because the historical conditions and because the origins of the two people were different, therefore, they have different sets of values, although they live in the same country.

Q. Do you condone premarital sex? A. Do I condone premarital sex? Again, I would have to look at each particular case and I would have to say what are the circumstances.

Q. All right. In what set of circumstances could you condone it? A. Well, let us say, for example, that a woman—let us say, for instance, that a woman and man that were both very deeply in love and that—let's say, for instance, that they were going to the university or something like that and they decided that they want to live together. In my opinion, that is their affair. I don't think that they are breaking any moral code as long [25] as they are not impinging upon the rights of other people.

Q. Doesn't this completely undermine the concept upon which this country was founded, the family unit system, really? A. I don't agree with that, sir. In fact, I have served in about four universities in this country and I have served as senior staff psychologist on the staff of Stanford University, where I worked in the dormitories, and my observations even amongst the individuals in such a status, you know, premarital sex is the rule rather than the exception.

Q. Does this make it right? A. No. I am simply stating that it is a fact, that it exists. It exists in every college, in every university throughout the union.

Q. Doctor, we are talking about high school and junior high school students today. This is not a university. This is a 12-grade rural school district. If I told you that the testimony has been that there is a very serious problem with school-girl pregnancies in this school district over the last two years, ages between 13 and 17, where a very high percentage of these students have had to drop out of school because of unwanted pregnancies, would you say that the act of employing teachers of unwed parent status would have an effect one way or the [26] other on these students? A. No.

Q. Now, you said that you thought that this was an inferential situation of a model in a classroom. How familiar are you with studies of minority groups, particularly in the Negro race, to the effect that many, many, a very high percentage of these, are broken homes, where there may be only one parent, in most cases a mother, with many children in the home and that the need of these children for a dominant parent figure, which in many, many cases has been transferred to a facility member, a classroom teacher—are you familiar with these studies? A. Very much.

Q. And you are going to tell us here today that you feel that the classroom teacher in a classroom over one of these students has no influence over that child's values or morals or conduct? A. I am saying that in the absence of overt behavior and in the absence of direct proselytizing there is no correlation between a woman's, quote, moral condition as an unwed mother and what happens in the classroom and, in fact, sir, to answer your question, one of the things that I am involved with at Columbia University has exactly to do with what you

have just been suggesting. It was only two weeks ago that we had Dr. Robert Hill, who is the [27] Executive Director of the National Urban League and who has written an excellent piece of work, namely The Strengths of Black Families, which tends to show that far from being a bad thing, that, in fact, this so-called matriarchal society tends to produce some very strong people under the circumstances. Under the circumstances of survival. And therefore I would recommend this particular book to substantiate what I am attempting to say here.

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[28] Mr. Terney:

Q. Your testimony today, then, Doctor, is to the effect that in minority groups, and particularly in the black race, that in the home that there is a need for a strong or dominate parent figure outside of the home that does not exist in the home, is that correct? A. Not necessarily. This is a presumption that has been made. The point that I have been making is this. There are many unscientific and untested hypotheses about the behavior of people. And that we tend to assume that it must be right simply because it is right and it is a part of the Anglo-Saxon, Protestant ethic. And the Anglo-Saxon, Protestant system happens to be one kind of system, which is not necessarily true for all people.

Q. Then, Doctor, do you feel it would be educationally sound, more sound than the situation we have now, for the school districts to employ black teachers for black classrooms? A. (No response)

Q. Rather than a white teacher over a black classroom? A. In my opinion, it would be sound if—given two situations. And assuming that I were the superintendent of a district and I had two people of equal [29] qualifications and where I had a predominantly black classroom and you were asking me which of these two people

would I employ, in my opinion, I would tend to employ the black person. Because that is one other way of producing the kind of climate and the kind of affinity that is necessary for a good psychological atmosphere.

Q. Doctor, we may need to call you in some of our other cases.

Just one or two more questions. You stated that you felt it ineffective and even an adverse method to attempt to teach morals in a school. Now, do you feel this holds true in the younger children—I'm not speaking about college level, I'm speaking about elementary, junior high school and high school level—do you feel that the school district should not even attempt to teach any values or morals in their school? A. What I was saying, sir, was that even if you tried you would not succeed. And I pointed to the reference to state that even in those situations where there has been a deliberate attempt to teach values, the experiments have largely failed.

Q. You are saying, then, the only place that it can come from is the home? A. The main place, the major place from which it comes is the home. By the age of seven a child's [30] character is largely formed. Their habit patterns, their thinking, the conceptualization is formed by the time the child is seven years of age.

Q. But not their system of values and morals, would you think? A. No, I would dispute that, sir. I would think that that is the time when a child largely forms attitudes, values, conceptualizations. There are changes as the child grows, but the most basic part of a child's education is between the years of zero and seven years of age.

Q. Just for my own information, do you know in the black home what the feeling is or what is taught as far as the morals or values are concerned concerning premarital sex?

Mr. McTeer: Your Honor, I don't exactly know what Counsel intends to get from that particular question. I would object. I believe the question is irrelevant.

Mr. Terney: Your Honor, if we are teaching the wrong things at the Drew school we want to know it.

The Court: I will overrule the objection.

The Witness: [31] Your question is, what kind of value system is taught in a black home?

Mr. Terney:

Q. With particular reference to premarital sex. A. I don't think that there is any overt attempt to teach one way or the other.

Q. Well, what is the moral standard in the average black home concerning premarital sex? A. The moral concerning premarital sex? Well, I would think that it all depends on the educational background of the individual. I think the attitudes towards premarital sex tend to change in relation to one's socio-economic and educational status. In fact, the higher up you go in terms of class the more liberal your ideas become.

Q. Right. If I told you that the black community in Drew was very substandard as far as economics are concerned, then what would you tell me that the moral standard in the average black home would be concerning premarital sex? A. They would tend to be even more rigid and more proscriptive than an upper middle class white family.

Q. Right. And you are telling this Court that you do not feel that if the Drew Municipal Separate School [32] District employs an unwed parent of an illegitimate child to teach a classroom of young students, that this has no adverse effect on the child as far as his morals are concerned, even though the employment could be construed as condoning this type of activity? A. Well, you see, sir, there is the implication in what you are

saying of promiscuity. I feel that premarital sex and promiscuity are two different things. If a person is promiscuous and can be shown to be promiscuous, then I would say yes, there would be—

Q. I have already told you we have a problem. The testimony has been there is a very definite problem in this very school district concerning unwed female students that have had to drop out of school because of unwanted pregnancies. A. In my opinion, that has nothing to do with the moral condition of the teacher. It has nothing to do with the fact that a teacher has had a child. Because what I am saying is that, really, we are not talking about that fact. What we are talking about is the fact of the intermediary, that is, contraception. The difference between an upper middle class teacher who cohabits and who gets away with it is the fact that she has access to the pill.

Q. But the children don't know that. The [33] illegitimate child is a living example of his or her past conduct.

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[34] Mr. Terney:

Q. From teaching positions. A. I would like to think about that.

Q. Do you believe homosexuality is moral or immoral conduct? A. As I say, I would like to think very hard about that one.

Q. You don't want to answer my question at this time, is that right? A. That's right.

Redirect Examination

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[35] Q. Have you ever heard in your educational experience of a rule of this nature? A. No. In fact, I think it is inconceivable.

The Court: Have you ever taught high school?

The Witness: Oh, yes, sir.

The Court: You have had high school teaching?

The Witness: Oh, yes, sir. Both in England and in Canada. I have also been the Supervisor of Teachers in practice in San Francisco.

The Court: What about elementary?

The Witness: Been vice principal of an elementary school.

The Court: [36] All right.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

(Title Omitted in Printing)

The following proceedings were had in the United States District Court, Northern District of Mississippi on March 20, 1973, before the Honorable William C. Keady, Chief Judge, at Greenville, Mississippi.

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[2] BETTY BARNES (WITNESS FOR PLAINTIFFS), being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walls:

Q. Would you state your name, please. A. Betty Jean Barnes.

Q. Where do you live? A. Drew, Mississippi.

Q. How long have you lived in Drew? A. Thirteen years.

[3] Q. Can you speak up a little louder. A. Thirteen years.

Q. Do you presently work in Drew? A. No.

Q. Have you had a job in Drew? A. As a substitute teacher, yes.

Q. Where did you teach? A. Hunter Junior High School.

Q. Hunter Junior High. Is that school under the jurisdiction of Mr. Pettey, the Superintendent? A. Yes. Right.

The Court: You say substitute teacher. That is not a teacher's aide?

The Witness: No. I was in a teacher's position.

The Court: Now, how old are you at this time?

The Witness: Twenty-four.

The Court: Thank you.

Mr. Walls:

Q. Miss Barnes, do you have a college degree? A. Yes, I have.

[4] Q. Where did you receive your college degree? A. Jackson State College, Jackson, Mississippi.

Q. Do you have a teaching certificate? A. Yes, I have.

Q. When did you receive that certificate? A. When? September of '72.

Q. Are you a licensed teacher under the laws of the State of Mississippi? A. Right.

Q. And why did you seek employment as a substitute teacher? A. Well, I wasn't able to—why did I seek employment? Well, I wanted to work and at the time substitute teacher was available.

Q. When did you first apply? Did you have to apply for the job? How did you get it? A. Yes, I applied for substitute teacher at the Drew High School.

Q. Did you fill out an application? A. At Hunter Junior High, no, but at A. W. James Elementary I did.

Q. Okay.

Will you tell us what process you went through to do that. A. Well, my name, address, education and [5] marital status—

The Court: Excuse me. At the elementary school, did you apply for the position of substitute teacher?

The Witness: Teacher's aide and substitute teacher.

The Court: Both?

The Witness: Right.

The Court: All right.

The Witness: Do you want me to tell you—

Mr. Walls:

Q. Now, what did you put on the application? A. Marital status, single and no dependents.

Q. You put no dependents? A. Right.

Q. Do you, in fact, have dependents? A. Yes, I have.

Q. Who are they? A. I have one son.

Q. A son? A. Right.

[6] Q. Now, were you subsequently hired in any manner? A. Not at A. W. James Elementary, no. At Hunter Junior High I was. At Hunter Junior High I was, but not at A. W. James.

Q. And you testified you did not fill out a formal application at Hunter Junior High? A. Right.

Q. How were you hired there? A. Well, the Principal was—knew that I had finished school and—let's see. How did I—

Q. Did he ask you or did you ask him? A. About the substitute position?

Q. Yes. A. Yes, I did.

Q. You asked him? A. Right.

Q. How long did you substitute? A. From—off and on from December through February.

Q. Which year?

The Court: This past December to February?

The Witness: Right.

[7] Mr. Walls:

Q. What year was that? A. December of '72 to February of '73, off and on.

Q. Are you substituting there now? A. No.

Q. Why? A. Well, I was informed that I—my services was no longer needed because of the fact that I had a baby.

Q. Who informed you that? A. My sister works at the school, and the Principal told her to tell me at the time. I was not called in direct and told.

Q. Now, how did that procedure work? How were you asked to substitute like? How did you know you were supposed to work on a given day? A. Well, I was called.

Q. Called by telephone? A. Right.

Q. To come in and work? A. Right.

Q. Now, have you been called any since that time? A. Since February of '73?

[8] Q. Yes. A. No.

Q. I mean since you were told that you could not work. A. No.

Q. During the time you worked as a substitute teacher, did anyone express any dissatisfaction with your work? A. No.

Q. Did anybody make any complaints about your work? A. No.

Q. Do you know of any other reason why you are not substituting now other than the fact you have a child and are not married? A. No.

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[9] Q. Well, why haven't you made application at all as a permanent teacher? A. Just—well, because

I—at the time of employment—at the time that they were employing, I was not available. And the reason that I haven't applied for a permanent position now is because of the fact that they know that I have a child and my substitute teaching position was terminated. So I felt that if I couldn't substitute then I was sure I couldn't have a permanent position.

Mr. Walls: May I indulge the Court?

The Court: All right.

Mr. Walls: We have no further questions.

Mr. Terney: May I proceed, Your Honor?

The Court: Yes, sir.

Cross-Examination

By Mr. Terney:

Q. Now, you stated that you filled out an [10] application for a substitute teacher and teacher's aide? A. Right.

Q. At the elementary school in Drew? A. Right.

Q. And you falsified that application? A. No, I didn't falsify it.

Q. Well, did you tell the truth on it? A. Are you saying because I put no dependents?

Q. Yes. A. Well, if you would call that—

Q. Falsifying? A. Lying—if you call that falsifying, then I did.

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[12] Q. But it did have a place on the one that you say you filled out for your marital status, among other things, and the number of dependents. Now, did you interpret that to mean the number of children that you had? A. Dependents. The number of dependents.

Q. What did you think that dependents meant when you filled out that application? A. The people who were dependent upon me.

Q. All right. Would that mean your child? A. I'm not counting my child dependent.

The Court: What was that? What was your answer?

The Witness: My child—I didn't carry my child as a dependent.

Mr. Terney:

Q. Where is your child? A. Where is he?

Q. Yes. A. At home.

Q. Lives in the house with you? A. (Witness moved head up and down)

Q. Are you presently unmarried? A. Right.

Q. You have one child? [13] A. Right.

Q. How old is the child? A. Seven months. Six and a half months. But this doesn't look like it.

Q. So you didn't think number of dependents on the form meant children? A. Well, I figured it meant dependents.

Q. Is your child dependent upon you? A. Dependent upon me?

Q. Yes. A. (No response)

Q. Who supports the child? A. (No response)

Q. Does the father support the child? A. No, he doesn't.

Q. Do your parents support the child? A. Yes. Because I'm not able to provide for him at the time. At the present time.

Q. When you were working, did you support the child? A. Well, like I said, I worked off and on. So you couldn't very well expect me to support the child working one day at a time every now and then.

Q. Are you employed now? A. No, I'm not.

[14] Q. Were you employed anywhere before you made application at the Drew school? A. No.

Q. When did you graduate from Jackson State? A. May of '72.

Q. And you haven't worked since that time except as a part-time substitute teacher at Drew? A. (Witness moved head up and down)

* * *

[17] Q. Has any official, Principal, Superintendent, Assistant Principal, Assistant Superintendent, anybody charged with the employment of substitute teachers, have [18] any of these people ever told you that you are not now eligible to teach at Drew schools as a substitute teacher because of your marital status and the fact that you have a child? A. And have I discussed this with them?

Q. Have they told you? A. Oh, yes.

Q. Who? A. The Principal.

Q. When did he tell you this? A. Well, he told me after the last of my substitute teaching.

Q. After the 19th or 20th of February? A. Right.

Q. Did he call you to the office? A. No, he didn't. I mean, he—let's see. How did I—

Q. He what? A. Are you saying after—

Q. I would just merely like to know when the Principal told you that you were no longer eligible to teach at Drew. A. And you are saying how did I get the information from him? Was it over the phone or in the office?

[19] Q. That's right. A. Well, I went in. I went—he told me by mouth, but I am trying to say how.

Q. Was it in his office? Did he call you into the office? A. No.

Q. Which principal was it? A. Langdon. Mr. Langdon.

Q. Langdon? A. Right.

Q. He told you directly? A. Right.

Q. Do you recall exactly what he told you? A. No. Other than I was—could no longer do substitute teaching.

Q. And did he tell you why? A. That the fact that Mr. Pettey had told him that I could no longer be used because of the fact that I had a child and wasn't married. That's the only thing he said.

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[20] VIOLET BURNETT (WITNESS FOR PLAINTIFF), being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walls:

Q. Would you state your name, please. A. Violet Burnett.

Q. Where do you live? A. Drew, Mississippi.

Q. Can you speak a little louder? A. I live at Drew, Mississippi.

Q. How long have you lived in Drew? A. Twenty-three years.

Q. Twenty-three years? A. Twenty-three years.

Q. Is that all your life? [21] A. All my life.

Q. Do you presently work in Drew? A. No.

Q. Have you ever had employment in Drew? A. Yes.

Q. Where was your last place of employment? A. As a teacher's aide in A. W. James Elementary.

Q. As a teacher's aide? A. Yes.

Q. How long did you work as a teacher's aide? A. From September of '71 to May of '72.

Q. May '72? A. Yes.

Q. Tell us how you obtained that job. A. Well, I was told by one of the teachers that—to go fill in an

application for teacher's aide position. And I was hired by Mrs. McCorkle.

Q. By Mrs. McCorkle? A. Mrs. McCorkle was supervisor.

Q. Did you fill out a formal or written application? A. Yes, I did.

Q. Now, what information did you enter on that application? [22] A. Name, address and so forth. Number of dependents, which was—I put two.

Q. Who were these two dependents? A. Myself and my daughter.

Q. Your daughter? A. Yes.

Q. Did you indicate your marital status? A. Yes. Single.

Q. You put single? A. Single.

Q. Were you hired at that time? A. Yes, I was.

Q. Was Mr. Pettey the Superintendent at that time? A. Yes, he was.

Q. And did Mrs. McCorkle at that time work for Mr. Pettey? A. Yes.

Q. And you worked from September '71 to May '72? A. Yes.

Q. Why are you not working now? A. Because I was told by Mrs. McCorkle that Mr. Pettey say we could no longer be hired because we had kids. All people that had kids and was not married could no longer be hired under Title I.

[23] Q. At the time you worked, from September '71 to May '72, did you receive any complaints about your job performance? A. No.

Q. What were your duties as a teacher's aide? A. Well, to take the kids to lunch—well, recess first, take them on the outside and let them play, bring them back in, get them washed up for lunch, take them outside again, bring them back, take my break, take them out to different

classes, music and art, and after that take [24] —they would have another recess, go out again and come back. And then have another class at 2, get them ready to go home.

Q. How old were these children? A. Five and six.

Q. What grade? A. First.

Q. Who spent more time with the students, you or the teacher? A. I did.

Q. Is that because of your status as a teacher's aide? A. Yes.

Q. Did anybody make any complaints about your job performance? A. No.

Q. Did anybody say that you were immoral at the time? A. No.

Q. Between September '71 and May '72? A. No.

Q. Did anybody give you any reason, other than the fact that you had a child and were not married, for your termination? A. No.

[25] The Court: How old was this child when you went to work?

The Witness: How old was my child?

The Court: When you went to work.

The Witness: Four years old.

The Court: At that time?

The Witness: Four years old.

The Court: Where were you then living?

The Witness: With my mother.

The Court: With your mother?

The Witness: Yes.

The Court: Who else was living in the house besides you and your mother and the child?

The Witness: [26] My father and my one brother and other four sisters.

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[28] Q. Miss Burnett, do you attend church? A. Yes, I do.

Q. What do you do in church? Do you teach any Sunday school classes? A. Not now.

Q. Have you taught Sunday school classes? A. Well, approximately three years ago I taught Bible class every Wednesday night.

[29] Q. And what kind of students did you teach? A. Some 16 to 18.

Q. Did you have your child at that time? A. Yes, I did.

Q. Did anybody in the community ever express any intention of having you discontinue this teaching because you had a child? A. No.

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[30] *Cross-Examination*

By Mr. Terney:

Q. How many children do you have now? A. One.

Q. Have you ever been married? A. No, I haven't.

Q. How old is this child now? A. She is five.

Q. Five years old.

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[31] Q. Well, do you personally feel that it's moral or immoral for an unmarried person to have sexual intercourse? A. I feel like as an individual a person can do whatever they want to, they has the freedom to do anything they want to as long as it's not hurting anyone but—I mean, if it's going to hurt at all.

Q. This is the way you felt about it when you were 17, when the child was born? A. No. I mean—well, yes.

Q. And that is the way you feel about it today? A. Uh-huh.

Q. You haven't changed your mind? A. No, I haven't.

Q. Do you intend to have any more children? A. No, I don't.

Q. Outside of wedlock? A. No, I don't.

Q. Why? [32] A. Because taking care of one is hard enough.

Q. Well, do you feel that it would be wrong for any of the students at the Drew High School to engage in sexual intercourse?

Mr. Walls: Objection.

Mr. Terney: Your Honor, I think it is very relevant.

The Court: Overruled. I will hear the answer.

The Witness: I feel like if that's what they want, they can do it. That's just the way I feel.

Mr. Terney:

Q. In other words, if you were teaching at Drew and some school girl came up to you, 13, 14, 15 years old, and she looked up to you as a teacher and asked you, said she really had a big problem, she wanted to discuss it with you, she wanted to have sexual intercourse with her boyfriend, you would tell her, "It's all right, go right ahead"? A. I would tell her if that's what she wanted and she felt like that's what she wanted to do, go right ahead.

Q. And you stated that you had more contact [33] with the children than the teacher? A. Yes, I do.

Q. Direct contact? A. From 8 o'clock to 3:30.

Mr. Terney: No further questions.

The Witness: Except for maybe—well, one hour and thirty minutes.

Mr. Terney: No further questions.

The Court: Any redirect?

Mr. McTeer: Yes, Your Honor.

Redirect Examination

By Mr. Walls:

Q. Miss Burnett, did any students ever ask you any questions like that at school? A. No, they didn't.

Q. Have you known any students to ask any other teachers questions like that at school? A. No.

Mr. Walls: No further questions.

LESTINE ROGERS (FOR PLAINTIFF)

[34] *Direct Examination*

By Mr. Walls:

Q. Would you state your name, please. A. Lestine Rogers.

Q. Where do you live? A. I live in Drew, Mississippi.

Q. How long have you lived in Drew? A. All my life.

Q. All right.

Miss Rogers, you are one of the plaintiffs in this lawsuit, are you not? A. Yes.

Q. Why did you file this lawsuit? Why did you have your attorneys file this lawsuit? A. Because I feel that as long as I am qualified to hold a position, no one can tell me I can't have the job if I'm qualified just because I'm an unwed [35] mother.

Q. Now, did you teach in the Drew school system or work as a teacher's aide in the Drew school system? A. Yes.

Q. Would you give us the dates and times? A. I worked from September of '71 till May of '72.

Q. How did you make application? A. I was told by one of my friends had already filled in an application, I went over to Mr. Crosthwait's office to fill one, and I filled it out and I was recommended by Mrs. McCorkle.

Q. All right.

Now, what information did you place on that application? A. Your name, your address, your marital status, your number of dependents and other junk.

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[36] Q. Why were you fired at school? A. Because I was unwed mother.

[37] Q. How do you know that was the reason you were fired? A. Because no one else complained of the work that I was doing, and Mrs. McCorkle told me that Mr. Pettey said so.

Q. Said what? A. Said that he could no longer use me because I had a child and wasn't married. She told me that Mr. Pettey said that.

Q. Did Mrs. McCorkle know at the time she hired you that you had a child and were not married? A. Yes, she knew. 'Cause she asked me, "Are you married?" I said, "No." She said, "But you have a child?" I said, "Yes." She said, "Well, Mr. Pettey says if you are not married and have a child he can no longer use you in the school system." I asked her why. She said, "That's not my rule, that's his rule."

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[38] Q. Now, let's go back to August of '71, at the time you were hired. Did Mrs. McCorkle know that you had a child and that you were single? A. Yes, she knew.

[39] Q. How do you know she knew that? A. Because I put it on the application and she—I knew she read my application before she hired me.

Q. Now at the time you worked, did anybody make any complaints about your work? A. No.

Q. Do you know of any other reason that you may have been fired other than the fact that you had a child and were single? A. No.

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[41] Q. As a matter of fact, you were pregnant at the time you were informed that you would not be reemployed for the 1972-'73 school year, weren't you? A. Yes.

Q. Have you ever been married? A. No.

Q. Do you intend to get married? A. I don't know.

Q. Now, you were a teacher's aide in what grades? A. I was special education, ranged from classes first through fifth.

Q. What age group were those children? A. I had them from eight till 18.

Q. Eight till 18? A. Yes.

Q. Did you have direct contact with those children? In other words, were you right there with them in the classroom, and outside and so forth? A. Yes. I had to stay with those children from 7:30 in the morning till 3:30 in the afternoon.

Q. Did they ever talk to you, or seek advice [42] from you or anything? A. Yes.

Q. They would come to you with their problems and so forth once in a while? A. The problem involving classwork. No other problem.

Q. But you did have a relationship with them where they would talk to you, and you would talk back to them, and they would discuss certain problems with you? A. Yes. Concerning classroom work.

Q. Were any of these children aware that you were pregnant at the time? A. No.

Q. Were any of these children aware that you had a child at home? A. Yes.

Q. Did they know, also that you had never been married? A. I don't know.

Q. Who did you live in the house with? A. My parents.

Q. And who else lives in that house? A. Sister and brothers.

Q. You stated that you weren't the sole support of your children. Who assists you in supporting [43] them? A. My parents.

Q. Are you receiving money from the welfare? A. Yes. For one.

Q. You then became pregnant while you were teaching, is that right, with the second child? A. Yes.

Q. Now, what is your feeling about the moral issue? Is it right or wrong for you or for any individual to have sexual intercourse and not be married? A. Well, I can't say it's right and I can't say it's wrong. Because I think it's left up to you as long as you are not hurting anyone else. I think you should do whatever you feel is right.

Q. Do you intend to have any more children? A. I don't know.

Q. Haven't decided? A. No.

Q. But you may have more children, even though you are not married? A. I don't know.

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Q. • • • [44] boyfriend and she asked you what you thought about it? A. Well, I have never had one to ask me, so in that case I wouldn't know.

Q. But if she did. If she came up to you while you were teaching. A. Like I said, I wouldn't know because—

Mr. McTeer: Your Honor, I think the witness has answered the question.

The Witness: —they have never asked me, so I haven't thought about it.

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Mr. Terney:

Q. Do you have an opinion whether it is right or wrong for a 15-year-old unmarried female student in the Drew public schools to have sexual intercourse with her boyfriend? [45] A. I don't know. It's left up to them to decide.

Q. Left up to them. You wouldn't help her out at all if she asked you?

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[47] *Redirect Examination*

By Mr. Walls:

Q. How long have you been on welfare? A. Well, my child will be on for about a year and a half.

Q. Do you receive welfare for yourself? A. No.

[48] Q. Just for your children? A. Yes. For one.

Q. If you were working, would there be any need for your children to be on welfare? A. No.

KATIE MAE ANDREWS (FOR PLAINTIFF)

[49] *Direct Examination*

By Mr. Walls:

Q. Will you state your name, please. A. Miss Katie Mae Andrews.

Q. Where do you live? A. Post Office Box 22, Drew, Mississippi.

Q. How long have you lived there? A. Twenty-three years.

Q. Miss Andrews, do you hold a college degree? A. Yes. I'm a graduate of Mississippi Valley State College in Itta Bena, Mississippi.

Q. And do you hold a teaching certificate? A. Yes, I do.

Q. What does that teaching certificate mean? A. Well, it means that right now that I can receive a job anywhere in the State of Mississippi or out of the State and I wouldn't have to go back to school until five years. It states on there that that's my five-year certificate and after five years you have to return to school.

Q. What process did you go through to get that certificate? A. Well, I had to work hard to get there.

Q. What are the qualifications for receiving [50] the certificate? A. Qualifications for receiving the certificate, I had to earn a total of 128 semester hours.

Q. Now, when you received that certificate from the State of Mississippi—is that where you received the certificate? A. Yes.

Q. Was there any requirement that you be married or that you—if you had a child that you be married? A. No.

Q. Did they have any qualifications dealing with the fact of having children? A. No.

Q. Do you have a child? A. Yes.

Q. And you stated you are not married? A. Right.

Q. How old is your child? A. He is four.

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[52] The Court: Did you apply for a teacher's aide position?

The Witness: I applied for a teacher's aide position.

The Court: All right.

Mr. Walls:

Q. Did you also apply for a teaching position? A. No, I did not apply for a teacher's position because the way I knew about this position, I was [52] sent there.

Q. Now, you made formal application for the teacher's aide position? A. Right.

Q. Okay.

What was the result of that application? A. Well, you didn't even need to be a college graduate in order to get the position.

Q. What I mean is, did you hear from the application? Were you hired? A. No, I did not hear from her.

Q. Were you hired? A. Well, she told me she would let me know when I could come in and begin work. So I took it from there that I had the job.

Q. Well, why didn't you go in? A. Well—now, would you ask that again?

Q. Why didn't you go in? Do you know why she didn't call you? A. Well, coming right up to the date that I felt that I should have taken the position, I decided to call her. And when I called her, she said, "Under Mr. Pettey's rule, you cannot work and have a child." And I said, "Thank you."

Q. Now, why did you apply for a teacher's aide [54] job and in fact you are a college graduate and have a teaching certificate? A. Well, at this particular time and at this time of the year, coming out of school, it's hard to get a job. So any job would do, you know, until I could find a job in my field, which that would have been a job in my field, elementary teaching.

Q. Now, did you have intentions of applying for a permanent teacher's job in the Drew Municipal Separate School District?

Mr. Terney: Your Honor—

The Witness: Yes.

Mr. Terney: —we object to the leading of the witness.

The Court: Refrain from leading, Counsel.

Mr. Walls:

Q. Do you intend to apply for a teacher's job? A. Yes.

Q. Have you made any applications for a teacher's job? A. No, not for a teacher's position. See, it's [55] like this. If you file an application for a teacher's aide and if a job should happen to come up, you know, as a teacher's position, then they could consider me from that point.

Q. And you stated that you were not hired as a teacher's aide? A. No.

Q. Do you expect to be hired as a teacher in Drew? A. Well, if possible, yes.

Q. Why do you want to teach? A. Well, I feel it would be close around home and I could help my mother, because she have helped me, you know, this far.

Q. Well, now, you have gone to school to become a teacher. Why do you want to teach? A. Well, I feel that I can help small children, you know, through the process of learning, reading. And I enjoy working with children.

Q. Did you go to school to become a teacher? A. Yes, I did.

Q. Are you presently working? A. Yes.

Q. Where are you working now? A. Baxter Laboratories, Cleveland, Mississippi.

[56] Q. What type of work is that? A. Factory work.

Q. Do you prefer factory work over teaching? A. I would prefer teaching.

Q. Why? A. Because I only accepted the job working in a factory to help me get out of school. And it's hard work and I don't intend to do hard work, you know, if I can help it.

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Cross-Examination

By Mr. Terney:

Q. When did you receive your degree from Mississippi Valley State College? A. Well, actually, I finished on my student teaching in Mound Bayou—Montgomery in Mound Bayou, [57] Mississippi—November the 13th. And I would not proceed in another course of action until May. That's when my graduation would take place.

Q. Do you now hold a degree? A. Yes, I do. A Certificate.

Q. A degree from Mississippi— A. Well, it's the same to me. It would be the same.

Q. What is the certificate? A. An A Certificate.

Q. Well, that's a teaching certificate. A. But to me that's the same as receiving a degree. Only thing I have to do is march.

Q. Oh, I see. A. You don't have to march.

Q. You haven't received your diploma, but you have completed the number of hours? A. Right.

Q. When did you complete the number of hours? A. November 13th, 1972.

Q. Have you ever taught school? A. Yes.

Q. Where? A. I have substituted when I would come home as my freshman year in school at Hunter High as a substitute [58] teacher.

Q. Did you have a child at that time? A. No, I did not.

Q. Didn't have a child? A. And substitute teacher at Eastside High School in Cleveland, Mississippi. I did my student teaching at Montgomery in Mound Bayou, Mississippi.

Q. So all that is left for you to do is walk down the aisle in May of this year and you receive a diploma? A. Right. And you do not have to walk down the aisle to receive it. Just pay your money and that's it.

Q. All right.

Will that degree be in education? A. Sure.

Q. When was your child born? A. January the 30th, 1969.

Q. And where were you at the time the child was born? A. I was in St. Louis, Missouri. I don't see where that has anything to do with it.

Q. You were living in St. Louis? A. Right.

Q. When the child was born. Where do you live [59] now? A. I live at P.O. Box 22, Drew, Mississippi, with my mother Eloise Andrews.

Q. And who else lives in the house with you? A. My sister, Marjorie Franklin, my brother, Freddy Dale Andrews, and my other brother, Bob Dale Andrews.

Q. Have you ever been married? A. No, I have not.

Q. Do you intend to marry? A. Well, I intend to marry when I meet the right person to marry.

Q. Do you intend to have any more children before you get married? A. Not until I get married. I didn't plan this one.

Q. Do you feel that it's wrong that you have a child out of wedlock? A. No. I mean, God put us here on earth and if it came up to that I feel that we should have them, you know. If we try to get rid of it, as most people do, that's killing it. Well, you know where we would wind up then. So I don't feel it's wrong, you know. I don't say it's right to just go around and just keep having them, you know. But if one mistake can hurt for once in life, you [60] know, everybody can go through one mistake.

Q. Well, do you believe it's wrong to have sexual intercourse before you marry? A. Well, I can't say it's wrong and I can't say it's right. Because I know—I mean, whatever desire you have, I know you aren't

going to—I mean can't anybody force anything upon you. I'll put it like that.

Q. Do you go to church? A. Yes.

Q. What are your religious beliefs about whether it's right or wrong? A. Well, it's wrong, but you can go to the altar and repent. The Bible say repent. It's a sin. You can repent for your sin and be forgiven.

Q. Have you engaged in sexual intercourse since the child was born?

Mr. Walls: Objection, Your Honor.

The Court: I sustain the objection.

Mr. Terney:

Q. Do you feel it's right or wrong for a school-age child, say a child of 15 years of age, female student at the Drew public school, to have sexual intercourse with her boyfriend outside of the marriage? [61] A. I wouldn't know. You know, I mean, I couldn't feel it's wrong or not because I wouldn't be around them and I wouldn't be dealing with children at the higher level. I would only be dealing with the children one through eight grades. My children would say—

Q. Well, if an older student came to you because you were a teacher in the system and asked you whether you thought it was right or wrong; what would you tell them? A. I wouldn't know what to tell them because I don't think they would come to me because I wouldn't be over there where they are. I would be in the lower level. And at the lower level it's one through six.

Q. You graduated from Drew High School, didn't you? A. Hunter High School, Drew, Mississippi. Drew High School.

Q. What year was that? A. 1967.

The reason I can't say it's wrong, because the time I was going to school I knew of a whole lot of children

was pregnant and the teachers didn't have anything to do with it. So you can't say the teachers engage in this.

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[63] Mr. Terney:

Q. You stated that your pregnancy was unplanned. A. It was unplanned.

Q. So it's conceivable that you could become pregnant while you were teaching, isn't it? A. During the time I became pregnant, as you say, black people wasn't aware of the many things that the white person would use in order to keep from getting pregnant. So if I had had all this counseling like, you know, maybe a parent that knew more about this, as a white person did, then I would say no, I wouldn't become pregnant at that time and no other time.

Q. Now, you filled out an application for Mrs. McCorkle when you applied for a teaching aide position, didn't you? A. True.

Q. And that application had a place for your marital status. And you put single? A. I put single and no dependents.

Q. No children. A. No children, either way.

[64] Q. And you knew what that meant, didn't you? A. I knew what it meant. I mean, but, as I told you, I knew the rule before I went over there.

Q. How did you know the rule? A. Because I came in contact with many people. Said, "Do not place an application at Hunter Elementary or A. W. James, whatever it is, because under Mr. Pettey rule you cannot work and have a child."

Q. So you lied about it? A. I lied about it, true. I needed a job. I don't want to work in a factory. You wouldn't consider your people to work in a factory all their life.

Q. How many other school districts have you made application to? A. Almost every one in Mississippi, just about.

Q. Do they have a place for your marital status? A. Sure.

Q. What did you put? A. I put single and I put one dependent.

Q. Why did you tell— A. Because this is the only place that that rule is set up at. I don't know of any other school but Drew.

[65] Q. Well, it is conceivable, then, that you may get a teaching position elsewhere, isn't it? A. I'm planning on getting one.

Q. I mean outside of Drew. A. If it have to be outside of Drew. I don't intend to work in the factory.

Q. So you are really not being barred from teaching, are you? A. In a way I am. Because I could be teaching now instead of going up to a factory every night working until 3 o'clock every night.

Q. But come September of 1973 it is conceivable that you will have a teaching job somewhere, isn't it? A. I may have one. I mean, let me explain this to you. I could have a teacher's job now in Alabama. But who wants to go to Alabama when they live in Drew, Mississippi?

Q. How much are you making at Baxter Laboratories? A. I'm making $2.67 an hour.

Q. How much is that a week? A. One hundred six dollars eighty cents.

Q. How does that compare to teaching salaries for the first year in Drew? A. It's less.

Q. Are you sure? [66] A. Yes. It's less, plus hard work. Teachers' starting salaries for I think this year or this past year was 65 or 6,000. Either one of the two. And the salary I'm making now, that's the whole

year. And the salary I will be making then, that's nine months.

Q. You have to go back to school from time to time, though, don't you? A. Five years. I plan on having my master's degree by that time.

Q. When are you going to school, in the summer? A. I plan on it.

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[67] A. I don't know.

Q. Would you want someone working for you that had made a material misrepresentation on an application? A. Sure. That's the only way they could get the job.

Mr. McTeer: Objection.

The Court: When you object, please rise, Counsel.

Mr. McTeer: Yes, Your Honor.

The Witness: If that's the only way they could get the job, by lying, sure.

Mr. Terney:

Q. Even though they were working for you? A. Right. They have got to make the money somewhere so they can feed their children.

Q. Are you getting any assistance from the welfare department? A. No. It's too less to even try to get. What is $30?

Q. Are you the sole support of your child? A. No, my mother is.

Q. You contribute to it, I assume, with the [68] money you are making? A. Well, I assume I will, yes.

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[70] FANNIE LOU HAMER (FOR PLAINTIFF),

being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McTeer:

Q. Good morning, Mrs. Hamer. A. Good morning.

Q. Would you please state your full name. A. Fannie Lou Hamer.

[71] Q. Where do you live? A. 721 James Street, Ruleville, Mississippi.

Q. How long have you lived in the Ruleville-Sunflower County area? A. Fifty-three years.

Q. Now, Mrs. Hamer, you must excuse my youth, but for the record, would you please state some of your involvement in the civil rights movement, please. A. Well, I have been involved in the field of civil rights, in the field of human rights since 1962. I started off in 1962 in voter registration, and I have worked from that time until now in different areas. And especially in Sunflower County.

Q. I see.

Mrs. Hamer, could you tell me a little bit more about your involvement in school desegregation and your involvement with teachers and students also. A. Well, I have worked in Sunflower County on the biracial committee with the desegregation plan in Sunflower County.

Q. Mrs. Hamer, would you please just state for the record of the Court just a few of the honorary degrees that you have received for your involvement in humanitarian activities. A. Well, in 1969 I received the honorary doctor [72] of humane letters from Tougaloo College. In 1969, I received the doctor of humanities from Shaw University, Raleigh, North Carolina. In 1970, I received the doctor of humane letters from Columbia College in

Chicago, Illinois. In 1972, in June, I received the doctor of humane letters from Howard University, Washington, D.C. And I have been on the faculties teaching black contemporary studies at Raleigh, North Carolina, Shaw University.

Q. Thank you.

Mrs. Hamer, would you please state for the record, also, just a few of the national organizations that you are a member of or member of the board. A. I am a member of the National Council of Negro Women, National Association for Advancement of Colored People.

Mr. McTeer: Your Honor, on the basis of this information, I would like to attempt to qualify Mrs. Hamer as an expert on the sociological and political thoughts of black people in the Sunflower County region. Undoubtedly, Your Honor, there is no black person in Mississippi or in the Sunflower County region who can talk more specifically, exactly on point as to exactly what the black people's feelings are in Sunflower County than the woman sitting in the chair.

The Court: [73] Do you wish to conduct a voir dire on her qualifications?

Mr. Terney: Yes, Your Honor.

The Court: You may do at this time. Limit it to the issue, however.

Voir Dire

By Mr. Terney:

Q. What exactly is the biracial committee for the Sunflower County school district? A. It was—the biracial committee was asked to form in the desegregation plan by Judge Keady a couple of years ago, and I was a part of that biracial committee, was elected from the Sunflower County—not the Drew separate district, but the Sunflower County biracial committee.

Q. Did you ever meet with the committee? A. Yes, I did.

Q. How many times? A. As long as it met.

Q. How many times did it meet? A. Well, I don't know. I didn't keep record of just how many times it met, but I was a part of that committee. I met with that committee from the first time [74] it met, you know, until it—you know, as long as it existed.

Q. But it didn't meet over one or two or three times at most? A. Well, it wasn't a bunch of times, but I was a part of it while it did last.

Q. Have you ever had any direct contact with the parents or students in the Drew public schools? A. Well, no more than working in Drew and doing voter registration. I know quite a few people in Drew because part of my family is in Drew.

Q. Now, voter registration was back in what 1962? A. But I still go to Drew. I go to church in Drew, I know people in Drew, I go to Drew now.

Q. How much time do you spend in Sunflower County now? Most of your time? A. Most of the time.

Q. Haven't you in the past traveled a good bit? A. Yes, I did do traveling. But I would be at home and I was always at home when I was needed in Sunflower County. All they had to do is to tell me when I was needed and I was right there. Because that's home.

* * *

[76] Q. Are you here today because you feel that you can speak for the entire black community or at least the majority of the black community in Sunflower County? A. Yes, I am here because I feel, and not only feel but believe that the black community would agree, and all of them that I have talked with and, in fact, two rode over here this morning with us because

they are concerned too, as we were, that we all agree that these young womens are not really on trial. You are trying all of us. Because when you say we are lifting ourselves up and you tell us to get off of welfare, then when peoples try to go to school to get off of welfare to support theirselves, this is another way of knocking them down. So we are here because we really don't like what's happening.

Q. You are here because you think there is a racial question involved, is that it? A. I believe it is.

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[77] The Court: Well, it is within the reasonable discretion of the Court to allow a witness to testify as an expert. I am going to allow Mrs. Hamer to testify.

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Q. Mrs. Hamer, as you heard yesterday, there has been a great deal of talk about the morality of the black community. And I would like to ask you simply at this time how, in your opinion, does the black community feel about unwed mothers? A. Well, it's quite a few people, black people in Sunflower County that have young people that's not married with children. But these are still our children. And we still love these children. And after these babies are born we are not going to disband these children from [78] our families, because these are other lives, they are—God breathed life into them just like he did into us. And I think these children have a right to live. And I think that these mothers have a right to try to support these children in a decent way.

Q. You think, then, that the black community has one point of view about children who are the progeny of unwed parents as opposed to what the white community thinks about the children of unwed parents. Can you tell me what the difference is, what the white community

thinks about unwed parents as opposed to what the black community thinks? A. Well, being a person who have worked from I would say the ground, I worked for white people for years, I worked in their house, I worked in the kitchen, and I know what's going on. And if justice was really done it wouldn't only be black women in here, it would be a whole lot of young white folk in here too. So what I am saying is I think it is being—the people that's being treated unjust—and this would almost be funny to me if it wasn't so serious.

Q. Well, how do people in the white community, from your experience, take care of their unwed *children*?

Mr. Terney: Your Honor, I don't believe she has been [79] qualified as an expert—

The Court: No, she is qualified, really, as a sociologist from the black point of view. That is what the Court would like to hear.

I would like to restate your question. In the black community—

The Witness: Well, I—

The Court: Just a moment. In the black community, is there any morality issue in having an unwed *child*? That is the question.

The Witness: Well, let me say this, Judge Keady.

The Court: All right.

The Witness: After a child is born, I don't think that people should be treated like a outcast.

The Court: No, that is not the question. But in becoming a parent out of wedlock, is that frowned on, looked down on, or is it encouraged and approved?

The Witness: [80] It's not encouraged. But people are not looked down on.

The Court: I see.

The Witness: It's not encouraged.

The Court: All right.

Mr. McTeer:

Q. What would be the effect, in your opinion, of this rule upon young black people in the Sunflower County area? A. Well, it would be quite a few people, quite a few young people lose their jobs, because I know so many young women that after having one child go back to school, finish school and yet not marry, but try to better theirselves by getting a good job so they can support their children without becoming a ward of the welfare. And this is really going to be a blow to them.

Q. What do you think will be the result when young black women who have tried to get themselves back through school, suddenly—after having gotten through school, rather, and having gotten a degree, they find themselves without a job because of the fact that they have an unwed *child*? What will be the effect to these young mothers, [81] to your understanding? A. It will be a terrible blow not only to these young women but it will be a terrible blow to all of us, not only in Sunflower County but across the State of Mississippi, across the United States where people are trying to lift theirselves out of certain things and bring theirselves up to a level where they can support theirselves and their child.

Q. What do you think will be the effect upon the child, the children of the unwed mother? A. Well, this is saying to the child that it, too, is not fit.

And you know, when I think of this—may I say this, Judge Keady? I think about the story of Jesus Christ. I think of what would have happened to Virgin Mary if she walked into Drew separate school, what would have happened if Christ had been born in that school. What would have happened? We are dealing with human being.

Q. Mrs. Hamer, I know that in your own life this particular question touches very close to home. Could you tell the Court about why it touches so close to home

in terms of your own life. A. Well, for one thing, I will talk about my daughter. I had two children, adopted children, Vergie and Dorothy Jean. And during my traveling around, Dorothy Jean [82] become pregnant. She was 21 years old. And one of my friends, a white friend in California, told me, me traveling, it might affect my reputation for her to have this child at home, and why didn't I send her off. And I told them I would stick as close to her as I could. So I kept her at home. The kid was born the 29th of December in East Bolivar County Hospital, 1965. She died in 1967, my daughter did. And if I had mistreated that child of my daughter, I would have never forgiven myself. I don't think that we have the authority to forgive man. Only God is in that authority. Only God got that power. Man is not to judge man. We don't have that kind of power.

Q. Mrs. Hamer, in your opinion, what do you think the black community thinks about teachers who are unwed mothers teaching their children? A. It's nothing wrong with an unwed mother teaching children. Because I'm sure in Sunflower County that we have some unwed mothers teaching some of those kids.

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[83] Q. Mrs. Hamer, to your knowledge, what do you think the black community's views are in terms of where [84] values are actually created? Are values created in the home or are values created in school? A. Values are created in the homes. You know, my mother and father of one marriage had 20 children. Six girls and 14 boys. And my mother and father taught us without any formal education about dignity and self-respect from the time that we were very small kids until we were grown. And I—you know, I was surprised yesterday to hear the kind of things, you know, like—that black

people don't have any moral and this kind of thing. That's not true. Because they do have. They have moral values. They do care.

* * *

[89] Q. Mrs. Hamer, does the black community feel that a woman has a right to her independent life, women like the plaintiffs in this matter? A. Yes. The black community feel that a woman, if she is not married and especially with a child have a right to make a decent living. And that's why I am here. Because I feel that Miss Andrews and the others have a right to make a decent life for their children. If they are married, then that's a different story. If the husband is able to support the family, that's different. But I do feel, and the black community feel that any woman with children or with a child have a right to lift theirselves and fight. One of the people out there that's in the [90] audience now that wanted to further her education after her child was born, we helped her to go to Mississippi Valley State College.

Q. Who is that person? A. Miss Andrews.

Q. You have known Miss Andrews for quite some time, haven't you? A. Yes, I have known her for some time.

Q. Do you know Miss Andrews' reputation within the community for her good moral character? A. Yes. Because—

The Court: What is it?

The Witness: Well, it couldn't be that bad with just one child. See, a person with a bad reputation to us is people that's standing on the street prostituting and these kinds of thing, selling their bodies and this kind of thing. But a person that have a baby and decide that they want to go to the school to further their education,

to make a decent life, a better life for their children, then I think they have a right to do it.

Mr. McTeer:

Q. Do you think that Miss Andrews and the other ladies, plaintiffs, et cetera, who testified today, [91] do you think the black community thinks that their actions are commendable for taking care of their children? A. Yes, I think it was good for them to try to do something to take care of their children. And everybody else in the community believe the same thing. That's the reason there's other black mothers here this morning.

Q. In other words, then, their actions as per the black community are quite moral? A. Yes.

* * *

Cross-Examination

[92] Q. Are you aware of the problem at Drew concerning the pregnancies of schoolgirls, unwanted pregnancies? A. I'm not aware of how many, no. I'm not aware of how many it is.

Q. Well, as spokesman for the black community and knowing the conditions in the black community, do you see a problem of student-age females becoming pregnant and having to drop out of school? Is it a problem in the black community? A. Well, it be some kids have to drop out of school to have babies.

The Court: Is that a matter of concern to the black [93] community?

The Witness: Well, it is a matter of concern if the kids are too young. But the people we are dealing with this morning are young women.

Mr. Terney:

Q. Well, I realize that. These plaintiffs are over 21. But I am talking about the children 13 to 18 years of age. A. Yes.

Q. Now, it is a problem at Drew, isn't it, of school-age girls becoming pregnant? A. Well, it's a problem with school-age children. That's not only with black children.

Q. No, I realize that. A. It's with white children too.

Q. But it is a problem? A. It's a problem with children.

Q. And it is a growing problem? A. Yes, with children.

Q. Do you have any idea what the solution to that problem is? A. Well, I think maybe more that we should become more active in the schools and visit in the schools, maybe, the parent.

[94] Q. And the schools leading them in the right moral conduct? A. Well, if he—this prove there's something going wrong if he keep them out and still that many people pregnant. Then certainly he not doing what he ought to be doing.

Q. Can't you foresee that if he employs people that have illegitimate children that the students will then think that this type of conduct is being condoned and think that it's all right and it may make the problem—probably would make the problem worse? Can't you see that? A. I don't believe that.

Q. Do you think that a teacher in a classroom has influence over the morals of a student in that classroom? A. Because, you see, I don't believe it's no grownup with any kind of moral would teach a child 13 years old or 12 years old anything wrong.

Q. The mere fact that that teacher has engaged in something wrong, whether she says anything about it, the fact that the child, the student knows that the teacher in front of him or her in class has engaged in sex outside of marriage and the product of that is an illegitimate

child, can't you see that that child would think that that teacher, if that teacher that that child respected engaged [95] in that sort of conduct, that they would infer it's all right for them to do it? A. You know what you have to do if that's what you are going to deal with? When you get back to Drew this evening, lock up the doors. There won't be any school.

Q. Why is that? A. The moral conduct. Nobody would teach.

Q. All the teachers? A. All of them. It might be two not fall out of the sack if that's what you call moral. Two. Lock it up.

Q. You don't have much confidence in the faculty? A. I'm just calling a spade a spade.

Q. Well, what is your opinion as to whether— A. I think people should have a chance not only—you know what Mr. Terney? If this was a young white woman with this same problem, I would come here and fight you the same way, because I would fight for her rights as a woman, as a person fighting for her child, just like these young womens are fighting for the right to take care of their child. You always tell us, we go through this thing with the welfare or we have got so many kids on the welfare roll, "Why don't you get up and do something?" And then when we start doing something, "You don't have any business [96] being that high."

Q. You realize that this rule is not racially motivated. In other words, this is enforced equally against whites and blacks. You understand that, don't you? A. I don't understand that. Because to save my life, is no way on earth that I could believe that every white teacher in Sunflower County is single that there hasn't been a child involved. I don't believe that.

Q. We are talking about Drew now. A. I'm talking about Drew. If there's more than two teaching there single.

Q. Let me ask your opinion. As spokesman for the black community at Drew, do you feel that it's right or wrong for a female student between the ages of 13 and 18 to have sexual intercourse outside of marriage? A. I feel like that they are too young.

Q. You feel that it is wrong? A. I feel that it is wrong.

Q. Do you realize that the rule does not condemn the child? It is the conduct of the parent, whether it's the mother or the father, that the rule condemns. A. But what I'm saying, if this child, you know—it's wrong, and I'm going to teach this child these things before this happen. But if this child should become pregnant, if it's 12 or if it's 13, I wouldn't cast [97] a child out.

Q. The rule doesn't cast the child out. Doesn't ask the child be cast out. It simply says that the parent, whether it is a mother or a father, is not qualified to teach in the Drew public schools. Now, does that, in your mind, deny that individual that would ordinarily have been teaching in that school system employment anywhere? Couldn't they apply to another school district or in another job? A. Well, I just have one question I would like to ask you. Why do they go if they can't work at home? Why do they pick up and go?

* * *

[99] Mr. Terney:

Q. You don't think that a teacher, then, has influence over a child's moral development? [100] A. They have some influence over youngsters. They have some influence. But today young people, as I deal with young people in Sunflower County, and I just want to say this for an example, our Educational Week in Ruleville, I think it was a year or maybe two years ago they—you know, they had speakers to come from different areas, and listen-

ing to the response, you know, how kids responding to different speakers that was there, and you could tell who they related to most. And it really wasn't teachers.

Q. Who was it? A. It was other people. It wasn't teachers. Sometime the teachers don't really reach the kids like, you know, we look for the teachers to teach our kids. But the parent is always closer than a teacher.

Q. What— A. I'm closer to my child than a teacher is.

Q. Of course you are. But what if the parent is missing in the home? That is what I am saying. Who does the child look to then? A. The kid is always—the kid is most of the time—now, maybe after a boy get up a certain age they kind of grasp out for a father. But a house with girls, where a girl is the case, they always tend to go to their mother. They always tend to go to their mother. Whether [101] there is two parent there or not. And kids a lot of time—the reason you having so much trouble in these different schools is by me being a local person and talk a lot to young people and young people talk a lot to me, a lot of time they write some of these professionals off. Because they know them. And it's not because they have had babies. So I think what really should be done—I'm not giving you no advice, but you ought to start listening where you are talking.

Q. Now, you testified earlier on direct examination that you felt there was a difference or the black community felt there was a moral difference in a person, quote, as you said, selling their bodies and prostituting themselves out on the street corner and engaging in the sort of conduct that the plaintiffs apparently have done here. You draw a distinction between the two.

Mr. Walls: Objection, Your Honor. There is no evidence that any of these people have apparently done what he said they have done.

The Court: Rephrase your question.

Mr. Terney: Excuse me, Your Honor.

The Court: [102] Leave out any reference to the plaintiffs. Just make a hypothetical.

Mr. Terney: Yes, sir.

Q. Does the black community differentiate or draw a distinction between moral conduct of the type of prostitution, that is, sexual intercourse for pay, as opposed to voluntary sexual intercourse outside of marriage without pay? A. See, you know, I think, Attorney Terney, this is ridiculous, to be going with this kind of questions and all that we are talking about, that woman should have a right to work in schools if they have got the education to lift theirselves from certain things that are happening in their lifetime, meaning that they have had a kid and they have got a—you know, they have gone to school to get a education to try to support their kids decent. And that's what we are talking about.

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[103] *Redirect Examination*

By Mr. McTeer:

Q. Mrs. Hamer, one short question. You have made some statement as to the difference between having an unwed child as opposed to walking the streets as a prostitute or whatever. But in the black community is the [104] real moral question whether or not a person had intercourse or whether or not a person conceived a child? In other words, does the black community think a person is immoral if a person conceives a child or does the black community think a person is immoral if that person has intercourse again and again and again and again? Which one of the two? A. If a person have a child, you know, I don't think that's immoral and a black community don't think that's immoral. You know, if a person have a child

and, you know, try to do something for the child, it's really no disgrace.

Q. But it's possible, isn't it, that someone can have intercourse again and again and again and again and again and never have a child? A. Certainly.

Q. Now, isn't it that kind of activity that the black community looks down on? A. That's what we look down on. That's the reason I said—may I just add this?

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

(Title Omitted in Printing)

The following proceedings were had in the United States District Court, Northern District of Mississippi on May 31, 1973, before the Honorable William C. Keady, Chief Judge, at Greenville, Mississippi.

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[16] MAE BERTHA CARTER (FOR PLAINTIFF), being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McTeer:

Q. Good morning, Ms. Carter. How are you? A. Fine.

Q. Ms. Carter, would you state, please, for the record, your full name. A. Mae Bertha Carter.

Q. Where do you live, Ms. Carter? A. Drew, Mississippi.

Q. How long have you lived in Drew, Mississippi? A. Seven years.

Q. Seven years.

Now, are you a member of the Drew community? A. Oh, yes, I am.

Q. Do you happen to know a Ms. Katie Mae Andrews? A. Yeah, I do.

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[78] Mr. McTeer:

Q. Do you have children in the public school system? A. I do.

Q. What do you think about an unwed mother teaching your children? A. I don't think an unwed mother—morals have anything to do with an unwed mother. I believe unwedded mother can be good moral citizens. Just because they have a child, I don't think that have anything to do with their morals.

Q. So, in other words, you would feel quite safe if you knew that Ms. Katie Mae Andrews was teaching your child? A. Oh, yeah.

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Cross-Examination

[19] Q. Do you have a child that is the parent of an illegitimate child? A. Yeah.

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Q. Do you recognize the fact that in the Drew public schools there is definitely a problem with school girl [20] pregnancies? In other words, students between the ages of 13 years and 17 years that have had to drop out of school because they became pregnant while unmarried? A. Yeah, they had to drop out. Sure. I know that children have to drop out of school.

Q. And you recognize that that is a problem at Drew today? A. I don't—yeah, I recognize that as a problem, but I don't think that Ms. Andrews or Ms. Rogers had

anything to do with those girls dropping out of school pregnancy.

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JOHN M. PERKINS (FOR PLAINTIFF)

Direct Examination

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[23] Q. Reverend Perkins, I have but one question. As a member of the clergy, what is your opinion of the so-called morality of an unwed mother? A. My opinion of the morality of an unwed mother has to do with the person committing a sin, a mistake, and in the sight of God she ought to be forgiven and restored to the right favor with the community and with the people. That is—I see the church's role as playing the role of nursing and forgiving people for mistakes. And I see it as a punishment to the private person to be kept from their livelihood or work because they have made a mistake.

Q. Indeed, then, Reverend Perkins, an unwed mother could teach in the public schools, according to your knowledge? A. If we would take any other principle, that would mean that we would have to take anybody in the church [24] who have committed sin and excommunicate them from the church or from their other place or position. I am taking a Christian position since it was sent to the clergy.

Mr. McTeer: No questions.

The Court: You may cross examine.

Cross-Examination

By Mr. Terney:

Q. Reverend Perkins, you are not attempting to tell this court that you feel that the Drew school system or any other school system, for that matter, should employ

individuals who have a background of actions on an immoral basis? A. (No oral response)

Q. In other words, are you telling the court that you think the Drew school district should employ a murderer or a burglar even though this individual may have committed one isolated act in this regard?

Mr. McTeer: Your Honor, ain't no murderers, no burglars here and this ain't about murderers or burglars.

The Court: Rephrase your question.

[25] Mr. Terney:

Q. What would you feel about the school district employing a burglar, convicted burglar?

Mr. McTeer: Your Honor, same objection, rephrase the question.

The Court: I will allow it. It is cross examination. Let's see what he says.

The Witness: I'm thinking more in terms of dismissing these teachers from their job. I would be against dismissing teachers who had committed an act of having a child out of wedlock.

Mr. Terney:

Q. What would you feel about a teacher who had been convicted of the crime of burglary? A. If the person had been restored by his church, and was a member of the church, and in good standing with that local church, then I would say that person should be employed. That's what we send them to prison for, to bring them back, to rehabilitate them back to the community.

[26] Mr. Terney:

Q. What do you feel is the effect of a teacher in a classroom over the moral development or character development of a child in that classroom, a student in that classroom? A. I think it has a lot to do with it.

Q. Do you feel that the teacher serves as a model for that student, to a certain extent? A. Oh, yes, to a certain extent, yes.

Q. Would you go so far as to say that outside of the home, outside of the home environment, that the classroom in a school has probably more effect on the development, character development, moral development of a child than most any other institution? A. Yes, I would think so.

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BENJAMIN HAL BUCHANAN
(FOR DEFENDANT)

Direct Examination

[28] Q. Dr. Buchanan, I believe you stated your name for the record. A. I did.

Q. Where do you reside at the present time? A. I live at Merigold, Mississippi, a suburb of Cleveland.

Q. Is that in Bolivar County, Mississippi? A. It is.

Q. And where are you employed presently? A. At Delta State College.

Q. In what capacity? A. I am Dean of the School of Education and Professor of Educational Administration.

Q. Dr. Buchanan, could you give us your educational background, please. A. Finished high school at Brandon, Mississippi; after two years of junior college at Perkinston Junior College, I received a B. S. degree from Mississippi State University. I then went into the Army. And then I came back and went to the University of Mississippi and received a Master of Arts in Educational Administration. After working in administration in schools for a number of years, I then received the Doctor of Education Degree from the Mississippi State University, with a major in Educational Administration and Psychology.

[29] Q. Would you relate for the court your educational experience and background. A. First served at

Yazoo City, Mississippi, as High School Principal, 1948 to 1950; 1950 to 1952, I served as Principal of the McComb City School System, the High School in that system; 1952 to 1956, I served as Principal of the High School at Greenville, Mississippi; 1956 to 1960, I served as Assistant Superintendent to the Greenville Municipal Separate School District; 1960 to 1965, I served as Superintendent of the Greenville Municipal Separate School District; from 1965 to 1970, I served as Superintendent of the Starkville-Oktibbeha County Municipal Separate School District; from 1970 to date, I have served as Dean of the School of Education and Professor of Educational Administration at Delta State College, Cleveland, Mississippi.

Q. Dr. Buchanan, would you please tell us of your professional affiliations and memberships in professional organizations. A. I might forget some of them, I will try. The Mississippi Education Association, the Mississippi Association of School Superintendents, the Mississippi Association of School Administrators, and lately I have served as an Institutional Representative to the American Association of Colleges for Teacher Education. I am a [30] member of the Association for Teacher Educators of Mississippi and of the National Organization. I was a member of the National Education Association. I have since 1952 been a member of the American Association of School Administrators.

I belong to several honorary educational fraternities: Kappa Delta Pi, Phi Delta Kappa, Phi Kappa Phi, Alpha Tar Alpha. I think that's about it. I might have left out some, I'm not sure. I would have to check my credentials.

Q. That's fine.

Would you comment on some of your works or publications that you have had or addresses and so forth that you have made. A. I did a Master's dissertation,

Master's thesis on the adaptability of public schools in Mississippi. I did a Doctor's Doctoral dissertation, it was a comparative study, it was a comparison of scores of pupils who were taught reading by the traditional or conventional method compared with those scores of people who were taught by programed materials. I have written numerous articles for papers, some for nonpublication.

I couldn't tell you how many addresses and speeches of various sorts in school systems ranging from assembly programs to baccalaureate addresses—not [31] baccalaureate, but commencement addresses at Delta State College, at a number of high schools. I would say maybe a hundred or so addresses of various nature, civic, social, educational, et cetera.

Mr. Terney: If the court please, we tender this witness as an expert witness in the field of education at this point.

The Court: All right.

Do you wish to conduct a voir dire, Mr. McTeer?

Mr. McTeer: Just a second, your Honor please. No.

The Court: All right.

You may proceed, treat him as an expert.

Mr. Terney:

Q. Dr. Buchanan, are you familiar with the basis of the lawsuit pending here today and with some of the transcript of testimony that has transpired in this proceeding? A. I am familiar with it and I have read a transcript of the record.

Q. With particular reference, are you familiar [32] with the regulation in the Drew school district prohibiting the employment of unwed parents as faculty members? A. I am.

Q. As a school administrator and an expert in the field of education, do you feel that this regulation has a reasonable or rational basis? A. I certainly do.

Q. Could you give your reason for that, Dr. Buchanan? A. Yes. Teachers teach by precept and by example. I hold to the tenet that a teacher cannot be a good teacher without being a good person, which involves morality, which involves character, which involves reputation, training, experience, et cetera.

Now, I was reared in the Judeo Christian tradition of ethics. I think it is quite important what a person is as well as what he professes to be, and the influence that he can have on youth, or adults, for that matter. I think it is most important.

Q. What do you feel is the relationship between a teacher and student as far as the moral character development of the student is concerned? A. In the formulative years, in the beginning years, the elementary, I would say that perhaps the teacher has more impact, more influence even than parents in many [33] cases. And certainly as much in most cases. And most of all in many cases. I think that the teacher has the opportunity to be the progenitor of ideas ranging from morality to intellectual, of course. And as such I don't think the teacher has a peer unless it be a well qualified minister of the gospel. I frequently state to faculties as school would open and as we deal with beginnings of new years that next to the ministry I feel that a teacher has an opportunity to be as forceful in the shaping of life and character of individuals as any person, perhaps second to mother and father.

Q. Have you ever had occasion in your experience as a school administrator to have a situation arise similar to the question at hand here today? In other words, have you ever had a teacher in one of your school systems that was the unwed parent of a child, or a similar situation? A. Yes.

Q. Would you relate that particular situation to the court. A. All of them? Or as many as I can remember? Or just one?

Q. As many as you recall, yes, sir. A. Let's see. The first one that comes to mind was a teacher who went home for Christmas holidays and while home for the holidays found that she was pregnant. She [34] was not able to come back to work. Her mother told me, because the young lady couldn't talk to me, really, she was emotionally disturbed and didn't have command of her faculties to the extent that she could talk to me—her mother told me that she was just on the verge of a nervous breakdown, that she didn't quite know how to cope and she wouldn't be back. I said, "Fine, because should she come back we would have to terminate her."

Q. This teacher was unmarried at the time? A. She was.

Q. Have there been other instances? A. Yes. I had an occasion wherein a teacher became pregnant during the year—

Q. An unmarried teacher? A. An unmarried teacher. And she told me that the father of the child was a teacher in the same system under my jurisdiction at the time.

Q. Was this also an unmarried teacher? A. An unmarried male teacher.

Q. All right. A. Was the father of the unmarried female teacher's child. He admitted that this could be true.

Q. And what action, if any, did you take? A. I recommended to the school board that we dismiss both of them forthwith.

[35] Q. Was this done? A. It was.

I think of one other case.

Q. All right, sir. Would you relate that to us. A. At the moment. I think of only one other at the moment. A married teacher—well, no, this has nothing to do with—that's right, it wouldn't apply. This was a cohabitation situation.

Q. Well, what, Dr. Buchanan, is your feeling as to the moral standards that a teacher should maintain? A. I think they should be above reproach and yet I know that teachers are mortals just like everyone else, even though I feel they ought to be a considerable cut above the average person on the street regarding morality, character, reputation. And I think that one who isn't really doesn't desire the right to be a teacher, for when we serve in loco parentis to children, from the time they leave home, wherever they live, until the time they return to their homes, we are definitely responsible for what happens to them to help them or for what happens to them to hinder in any way whatever the development of moral and spiritual and intellectual responsibilities.

Q What effect do you feel that the employment of an unwed parent in the school system would have on the [36] student-faculty relationship and the effectiveness of the teacher? A. First let me speak to student-faculty relationships. At the very earliest ages at school, of course, most children wouldn't know too much about this. But as they reach the third grade, as they come to the age of puberty, as they come to the development stage in the third grade on up, they begin to notice, some of them even before this age, they begin to know, they begin to whisper and talk. Life is full of mysticism to them, there are many mysteries, and they naturally are inquisitive and want to ask questions and need to be given direct and good information.

I think that as the child from the third or fourth grade on up is concerned it would definitely to some children, not to all, because you know all of us are the result of everything that has ever happened to us, psychologically I know this, and we are nothing more than a total sum of the experiences that we have had, and to some it would mean nothing, to others it would be a shattering thing. And those who have been reared in Christian homes or those who believe in a code of morality and ethics in life would suffer. No doubt about it, in my opinion.

Q. Well, on the other hand, how do you feel this situation would affect the intra faculty, or faculty-faculty, [37] relationship? A. I can speak from some experience in this. It is a debilitating thing. It is something which causes ill feeling among the faculty, for if we are fair, and we should be with everyone, and if we don't discriminate one against another, then we need to have all the same rules and regulations. And for one to be allowed to do something that another is not, whether it be unwed pregnancy or theft, you just can't seem to justify it. It would be disastrous to some, it would be objectionable to most. There may be a few who wouldn't care too much, but I would think we would want to get rid of them anyhow.

Q. Well, how do you feel that a situation such as this, a teacher who is an unwed parent, how would this—or would it?—affect the ability or effectiveness of this teacher in a classroom? A. Yes, I think it would affect the teacher in several ways. First let's talk about the self-concept of the teacher. My previous testimony gave rise to some thinking on this question. To some this would literally shatter their self-image. The extent to which this would happen psychologically would be the extent to which the Judeo-Christian ethic that I subscribe to, or whatever ethic or morality code the teacher subscribes to, if it has meant something to them it would hurt them. If it [38] hasn't meant something to them, it probably would not hurt them.

Now, as to the ability of the teacher, as far as knowledge is concerned, it has no effect. I don't think you could say, except for the preoccupation which it causes, that the knowledge would suffer at all. Certainly she could be as kind and gentle in the classroom, she could be as warm in nature, except for the preoccupation of thought and action and self-image that might be involved psychologically, as she ever was. So she could talk as nicely, she could speak as well, articulation wouldn't be a problem, knowledge wouldn't be a problem, but there definitely would be a problem with self-concept to the extent to which the psychological makeup of this teacher has been steeped in whatever ethic or code of morality that this teacher subscribes to.

Q. If it became knowledge among the students of this condition or situation as far as the faculty member were concerned, would this knowledge have an effect on the teaching effectiveness of the teacher? A. Very definitely it would. Especially at the upper levels. For example, from junior high on up respect must be there for a student to even pay attention in most cases. And unless it is there, then it could be detrimental. And of course the more that a teacher can [39] relate to the student to find out about him, to show interest in him, the more good he should be able to do for him, for the student. And if this student "turns him off" then of course he doesn't have a chance, it would be very detrimental, in my opinion.

Q. Dr. Buchanan, there has been some testimony in this proceeding and prior, previous hearings to the effect that in the black community there is no stigma attached to the unwed parent status. In your experience as a school administrator and as an educator, what do you feel is the moral judgment or standard in the white community concerning this situation? A. I think there is

definitely a stigma to it. And don't underestimate your black clientele, too. There is a stigma to it to many of them.

Mr. Myers: I would like to interpose an objection to any testimony from the doctor from Delta State with regard to anything relative to the black community, based on his incompetence and incapability of doing so, being not a member of that particular community.

The Court: That would simply go to his credibility. Go ahead.

Mr. Terney:

[40] Q. Let me ask you this. Have you been in integrated school systems in your experience? A. I have, definitely.

Q. Both whites and blacks? A. Correct.

Q. You have dealt with both white and black faculty members and students? A. Correct.

Q. All right.

Are you familiar or have you ever been in the Drew area or familiar with the Drew school system? A. Yes, I have.

Q. As a matter of fact, you made an address at the high school graduation last year? A. That's correct.

Q. And you served a great deal of your time in education in the Mississippi Delta, is that correct? A. A great portion of it, yes.

Q. In integrated situations? A. Correct.

Q. With your background and experience and your familiarity with the Drew school system and Delta public school systems in general, do you feel that there is a need for such a regulation as we are discussing here today? A. I definitely do, yes.

[41] Q. Are such regulations customarily written or codified by a school? A. They weren't by the school boards I worked for. It might be a good thing for them

to be, but I don't know of a school system that has had enough cases to make it a regulation. And yet there are frequently this type of thing. Over my 20 years of experience I think I cited four, and I think I can vaguely remember maybe another one or two. I don't think most school boards put such things on their minutes.

Q. In other words, you can't cover every specific situation? A. Not possible. No way.

Q. What do you feel would be the effect if the school board permitted the employment of unwed parents? A. I think it would lead to a degenerative attitude on the part of some teachers, many parents. I think there would be an uprising, perhaps, in many instances by—maybe uprising is a little strong. I think there would be serious objections to it. And it could even get to proportions that might be a general public concern. No doubt about that in my mind.

Q. Do you feel that the regulation as stated is discriminatory against any individual because of their race? [42] A. As you consider discriminatory, do you mean one against whites or blacks as such?

Q. Yes, sir. A. No.

Q. Would you say it's more discriminatory against one race as opposed to the other? A. No, I do not think it's discriminatory. But naturally I think perhaps one race, in my experience, one race has perhaps been affected more than the other. But I don't think it's discriminatory.

Q. Would you say it's discriminatory as far as sex, male or female, is concerned? A. No, sir.

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[43] Q. Buchanan. Dr. Buchanan, when you were principal at Yazoo—was it Yazoo High School? A. Yazoo City High School, yes, sir.

Q. Was that an integrated or segregated high school? A. At the time it was segregated.

Q. How about McComb City? A. It was segregated.

Q. How about Greenville High originally? A. Originally it was segregated.

Q. When you were assistant superintendent of Greenville High School, was it integrated or segregated? A. Segregated.

Q. When you were the superintendent of the Greenville Municipal Separate School District, was it segregated? A. It was during the time that it was—it was integrated. It became integrated while I was there.

Q. I see.

Now, how many years of education do we have between the time of your involvement in Yazoo City up to the time in which there was integration? [44] A. From Yazoo City 1948 to integration 1964, I believe it was, when our board moved to go. It would be what—

Q. About 16 years. A. Sixteen years.

Q. All right.

So you have 16 years of segregated education. A. Correct.

Q. Now, you also went to what school? A. Starkville.

Q. Was Starkville a segregated or integrated school? A. Integrated the whole time.

Q. When you went there as a student? A. Oh, you mean—I didn't go there as a student. I went to Mississippi State University as a student.

Q. Was that segregated or integrated? A. It was segregated.

Q. Where did you go to high school? A. Brandon.

Q. Was that integrated or segregated? A. It was segregated.

Q. Very good.

Now, Doctor, you said a number of interesting [45] things about unwed parents. Have you done any studies to justify your opinion? A. Studies?

Q. Yes, studies. A. I have never conducted a study. I have read some, yes.

Q. What have you read? A. Well, I read the transcript of the evidence that has been taken here and I read a portion of a study from—Mister—the attorney gave me. I have read recently, the last few days, some on ethics and morality and the Judeo-Christian tradition and the early philosophies of people from Aristotle on up.

Q. I see. A. How these things more or less came to be developed.

Q. But have you done any studies particularly on unwed parents? A. I have never done a study as such on unwed mothers.

Q. Have you done any studies on unwed mothers as students? A. No.

Q. Doctor, that is amazing. That is amazing. You mean to tell me you haven't done a bit of study on an [46] unwed parent as a teacher but further understanding the fantastic problem that Mr. Terney talks about which I assume takes place all over the State of Mississippi, you haven't done a bit of study on the unwed parent as a student? A. Let me clarify my statement. I said I had not done a study. By a study I mean you go into research and do a paper or do a book or do whatever it is. I thought you meant had I done studies. I didn't know that you meant had I read about them. Yes, I have read some. Quite a bit.

Q. What have you read? A. The part that deals with the morality of—

Q. The part of what, Doctor? A. Morality of teachers. Morality in general, ethics in general.

Q. Doctor, what have you read? Namely. A. By article?

Q. Yes, sir. A. I can't name them.

Q. By book. A. (No oral response)

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[48] Q. So, in other words, you can say very clearly that you have not done any studying personally on the field of unwed motherhood, you have done no studies of the effects among unwed motherhood, no studies on the impact of unwed motherhood, is that correct? A. No studies or no studying?

Q. You have done no studies. [49] A. No studies.

Q. Now, what studying have you done? A. Since I have been in the education business for the last 20 years, from the ethical, philosophical, mores, convention and all this type of thing of peoples, societies, I would have to say it's been over this whole period.

Q. I see.

Now, Doctor, could you please tell me exactly what items or documents have you studied which go directly to the ability of the unwed mother to teach? A. I haven't.

Q. You haven't studied it? A. I don't think I have had an article that dealt with the ability of the unwed mother to teach.

Q. Very good. A. No.

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[50] Q. But, Doctor, once again I ask you, how do [51] you measure the impact of unwed parenthood in the teacher position upon the student? A. (No oral response)

Q. What is the basis of your thoughts other than your opinion? A. I know that it's morally wrong, according to all of the ethics that I have ever read and studied, according to the Bible and according to every other background, philosophical way of thinking that I know of.

Q. Doctor, you have made a number of statements about morality and a number of statements about Judeo-Christian ethics, I think. I would like to ask you a few questions about your feelings on morality. A. All right.

Q. Doctor, did you speak out in 1954 and earlier in favor of integration of the public schools? A. No.

Q. Why not?

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[52] Q. That's correct. A. For one thing, I wasn't convinced that it was the best thing to do for all children concerned.

Q. Are you— A. And I had been reared in a situation of separate schools for separate races.

Q. And that upbringing certainly has— A. Which had some bearing on my background.

Q. Of course. And it certainly has affected your thought, hasn't it? A. Probably has, yes.

Q. I see. Very good.

Now, Doctor, could you please state to me what is your present opinion of the viability of black children and white children going to school together? A. Explain what you mean by the viability.

Q. Do you think it's an advantageous thing for black children and white children for both of them to go to school together? A. In some cases I can't say it is, no. I think [53] it's an advantage—it might be an advantage for some and a disadvantage for others. However, it is the law of the land now and, whether I like it or not, that is what I have tried to promote since it happened.

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[54] Q. All right. Do you assume, then, that children do find out about the sexual acts or sexual relationships of teachers? A. I have no way to assume this.

Q. No way to assume that whatsoever? A. Except through gossip and through hearsay and this type of thing.

Q. I see. So then it is quite probable that a student who was taught by an unwed parent could be educated by that unwed parent without any knowledge whatsoever of that unwed parent's status as an unwed parent? A. Sure it's possible.

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[55] Q. Doctor, did you have or is it possible that you may have had unwed school teachers in your district teaching and you never knew about it? A. Possible, sure.

Q. Is it possible? A. Possible.

Q. Is it possible based upon the fact that probably unwed male parents are much more difficult to find than unwed female parents? A. Say it again now. Is it possible that unwed male parents are more difficult to find—

[56] Q. Are more difficult to find? A. I think it is.

Q. You think it is? A. I think generally if you are searching for them, I think so.

Q. What method did you use to find these unwed parents? A. I didn't use a method. It just came to me as reports.

Q. You said also that in none of the school districts in which you taught there was no specific rule that was written out that said the policy of the school was that unwed parents shall not be hired, is that correct? A. That's correct.

Q. Why is there no specific written rule in any of the school districts in which you taught? A. Just wasn't often enough to merit one, I suppose.

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[58] Q. Now, Doctor, you say that you are the Dean of Education at Delta State College? A. Correct.

[59] Q. Now, would an unwed parent be excluded from the school of education because of the fact that they were an unwed parent? A. It has never come up. No, I doubt if they would. I just thought of something else. You said would an unwedded parent be excluded from the school of education at Delta State College. I doubt that she would. However—and it has never come up since I have been there.

The Court: You mean as a student or as a teacher?

The Witness: As a student. As a teacher I can assure you that she would, as far as I'm concerned. This, though, has to be faced by whomever enters the teacher education program. By the way, I am director of the teacher education program there. Whoever enters the teacher education program must enter on recommendation of the department or the discipline from which they hope to graduate. For example, if a person wanted to be an English teacher, she has to be recommended by the faculty of the English Department, including the character references, the attention to studies and all of these things.

Q. But, Doctor, we are talking about— A. But it has never come up.

Q. Well, first of all, let me ask you this. Do [60] you have any policy or any procedure set at Delta State College by which to review unwed parent status or child status of students? A. Not that I know of.

Q. There has been no such procedure? A. Not that I know of.

Q. Yet, however, you state that an unwed parent, were that unwed parent to come to Delta State College to teach or to get a degree in order to teach, you are saying that that parent would not be granted the recommendation of the supervisor or whoever— A. No, I didn't say that.

Q. What are you saying? A. I am saying that a person to enter the teacher education program must have the recommendation of the department in which they want to graduate.

Q. You are saying, then, the unwed parent would not receive that recommendation? A. No, I didn't say that. I didn't say that. It has never come up. We have never had to face the issue.

Q. How do you know? How do you know that there were not unwed parents in your class— A. I don't know that. But I am saying to you it has never been an issue.

Q. I see. [61] Now— A. If there had been unwed parents trying to enter or they may have entered and graduated, I don't know, but it has not been an issue. It hasn't been brought up, to my knowledge.

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[62] Q. I see.

Now, Doctor, does the State of Mississippi, to your knowledge, have any requirement stating that unwed parents cannot teach? A. No. But it has regulations about the character of teachers.

Q. I see. So you are assuming, then, that an unwed parent automatically has some kind of detriment of character? A. Or morals or whatever.

Q. Character or morals. No matter what the situation? A. Uh-huh.

[63] Q. No matter how it occurred, no matter where, when or how, any person that has a child out of wedlock has a moral or character detriment? A. I would say that.

Q. I see. So despite the fact that the State of Mississippi and the Delta State College might say that this individual would be qualified to teach, you would say, however, as the person in charge of the school district, you would recommend that person not be hired? A. I think I would, yes.

Q. I see.

Now, I would like to pinpoint a little bit more exactly what are these detriments of character of the unwed parent. A. They are your terms. I don't know what you meant exactly. I thought you meant that there was some weakness in their character or something that you would consider as a mark against—instead of being elevating and improving the reputation or the recommendation for the person, it would be something that would detract. This is what I thought you meant.

Q. Doctor, going back to your statements on Judeo-Christian ethics, have you ever heard the Bible verse that he who is without sin, let him cast the first stone? A. I surely have.

[64] Q. Would you please explain to this court exactly what is your understanding of the meaning of the verse? A. My understanding of the meaning of the verse is that we shouldn't be prejudging everybody else, that nobody is without sin.

Q. Nobody is without sin? A. Except, of course, our Christ.

Q. I see.

Indeed, sir, are you aware of the fact that both of these ladies are deeply involved in their church, the plaintiffs in this matter? A. No.

Q. I see. A. I don't know the individuals.

Q. I see.

Now, are you saying, then, that—again, are you saying that if an individual is an unwed parent and after he becomes an unwed parent, whether it is a mistake or other, we won't get to that issue, are you saying that if this person dedicates his life to Christ, the Gospel, this person is not able to teach in the public schools even though he may be active in his church, active morally with other friends, but the one mark stands as a scarlet letter against his entire background? [65] A. I don't know that it would stand against his—of course, it would be against his background, but I have known people who were known thieves, I have heard them give testimony of their lives wherein they say, "Until I came to know my Lord and Savior I was thus and so. Now that I do know, I am something else." And I have known them to become ministers.

Q. I see. A. You see. So it's possible—

Q. So, in other words, an unwed parent could become your minister, couldn't he? A. Could.

Q. Then why couldn't that unwed parent be one of your teachers? A. Under certain conditions of knowledge of this rebirth, as we call it, it might be possible.

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[66] Q. So indeed then if a person has time to think over the acts that he has committed, whatever it may be, and the person then rededicates himself so that he may become better able to do that which he must do, then couldn't that person be able to fulfill certain standards? A. I would say he could.

Q. I see. A. But here is the problem in it. It is a matter of in a community where everyone knows everyone else, it's a matter of reputation. You see, character is one thing, reputation is another. One's character

might be shining white and correct all the way, but his reputation might not be as good. And the opposite could be true. One's reputation might be very good, but his character actually might not be so good. So it is the effect that you would have and the advisability of this type of thing that would have to be considered, I think.

Q. So, in other words, what you are saying is that a person who is an unwed parent, assuming—you assume, of course, that their unwed parenthood gives them a bad reputation, you are saying then that person cannot [67] correct that reputation? A. I didn't say that, no. I think they can.

Q. So, then, a person who is an unwed parent could indeed have a fine reputation in his community? A. After whatever it takes to purge himself of the—

Q. Of course. A. I suppose.

Q. Are you aware of the fact that there are people who have testified for both of these parents to say they have fine character in their community? A. I haven't heard that.

Q. Do you think if people come in and are willing to take that step that is some evidence of the fact these people would think they may have fine character in their community? A. I would think it would be an indication of it.

Q. I see.

Doctor, would you hire an atheist as a teacher? A. If I had my choice, I wouldn't, no.

Q. Would you hire a Jew? A. Oh, yes.

Q. Would you hire a Catholic? [68] A. Oh, yes.

Q. Would you hire a Communist? A. No.

Q. Why wouldn't you hire an atheist if you had your choice? A. Because I think there are too many people who have some particular faith that they can hang on to in a time of stress and trial and tribulation whereas

an atheist I'm afraid doesn't. And I think that it is quite important that every person—and I am not saying that you have to be a Christian to be a good teacher—

Q. I see. A. I am a Christian, but I don't say that you have to be a Christian to be a good teacher. But you must have something of spiritual depth, of value systems that would give you a philosophy of life or an ethics code or whatever it is that you can hang onto when the going gets rough or when you are called upon to do the job you are expected to do.

Q. I see. So an atheist would not have this value system? A. No, I'm afraid not. I don't know enough about atheists maybe, but I would say no.

Q. Very good, Doctor.

Now, Doctor, does this particular rule as [69] was set up in your school districts, did it challenge the promiscuity of a teacher or did it challenge the fact that a teacher might have a child? A. I don't think—

Q. In other words, Doctor— A. I don't think it challenged the promiscuity of the teacher. I think it was the fact, I think it was the result that made it necessary.

Q. All right.

Now, I would like to give you a number of examples and I would like to get your answers on these questions. Would you hire a woman who had had a child out of wedlock and then came to you for a job? A. If that's all I knew about her, no.

Q. Would you hire a woman who had a child out of wedlock, got married, and then came to you for a job? A. Had the child first and then got married?

Q. That's correct. A. I doubt it.

Q. I see.

Would you hire a person out of—a person who you knew had had intercourse many times but for some strange reason did not have a child? A. No, I wouldn't.

Q. You would not hire them? [70] A. No.

Q. Would you hire an adulterer? A. No, not knowingly.

Q. You would not hire a fornicator? A. No.

Q. Would you hire a person that used contraceptives? A. Surely.

Q. Would you hire an embezzler? A. Not knowingly.

Q. Would you hire an individual that had an abortion? A. You would have to tell me more about the individual.

Q. An abortion that was out of wedlock. A. No, I don't think so.

• • •

[71] Q. Now, you have stated the fact that you would not hire a fornicator, but, on the other hand, you stated the fact that you would hire an individual who used contraceptives. Now, if you knew that an unwed person were buying contraceptives, would you hire him? A. No.

Q. You would not hire a person solely because of the fact that they were buying contraceptives? A. Well, I assume that you mean if he is buying them he is using them.

Q. If he is using them, that's correct. A. Is that your inference?

[72] Q. That's right. A. No, I wouldn't employ him.

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[74] Q. I see. And you also assumed the fact that if a teacher has no ethics then it also—there would be no problem in terms of the teacher's ethics, if the teacher had no ethical feelings, correct? A. My statement was, I believe, to the extent of the psychological background

and makeup of the individual it would affect them proportionately to their feeling of morality about any of these things, that or any other.

Q. Doctor, isn't it also possible, however, that an individual could commit an act, feel that they still have a life to live and attempt to do everything in [75] their power to correct all difficulties? A. Surely.

Q. Isn't it also possible that they could gain the respect of their community for doing that? A. It is.

Q Isn't it also possible then, Doctor, that not only would they gain the respect, they would be extremely effective in anything they did? A. It's possible.

• • •

[77] Q. Now, the testimony that you have given today, your feelings and observations that you have made in regard to this particular regulation that we are dealing with, is it based on your experience and educational background or is it based on some readings on the subject? A. Both.

Q. The views that you hold are not racially motivated, are they? A. None whatever.

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Redirect Examination

[78] Q. Now, do you have any connection with an institution for unwed mothers? A. I do.

Q. In what capacity?

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Q. In what capacity are you connected with an institution for unwed parents? A. I am a member of the Board of Directors of the Mississippi Children's Home Society. This society has two parts, really. It has a children's home for orphans or for children given out for

adoption for any reason, it also has the Crittendon Crestview Home for Unwed Mothers. [79] And I hear reports about it, I do not deal directly with the unwed mothers, I deal with the people who deal with the unwed mothers, as a member of the Board of Directors. I have a great deal of empathy for them, I want to be helpful to anybody that I can help. And it is a nonpaying, nonsectarian, nonpolitical situation. I was asked to join the Board simply because they wanted people from all parts of the state to help set policy and to help raise funds, if you please, and get contributions to carry on the work of the society.

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[84] Q. Would you tell me and the court how you view a teacher's status not only in the school system but in the community as far as his moral conduct should be. A. I think my prior testimony will bear this out. I think the teacher should be close behind the minister in his morality, in his influence on youth and adults in the community. I think he should be above reproach.

• • •

[86] Q. Doctor, what is the name of the home of which you are presently a member of the Board of Directors? A. The Mississippi Children's Home Society.

Q. I see. Would you please tell me how many unwed parents or orphan children are kept at this place? A. I can't tell you. I could guess I think pretty closely. Seems to me at our last annual meeting the number which had been kept during the year was a hundred something. I'm not sure.

Q. Would you please give me the racial composition of that group? A. White.

Q. All white? A. All white.

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[88] RUBY NELL STANCILL (FOR DEFENDANTS)

being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Terney:

Q. Would you state your full name for the record, please. A. Ruby Nell Stancill.

Q. Mrs. Stancill, where do you live? [89] A. In Drew, Mississippi.

Q. How long have you lived in Drew? A. Almost 22 years.

Q. And where are you employed? A. At the Drew High School. By the Drew Public Schools.

Q. In what capacity? A. High school mathematics teacher.

Q. How long have you taught in the Drew School System? A. Twenty-two years.

Q. What is your educational background? A. I have—went to Junior College at Clark Memorial College in Newton, I have a B. S. Degree from Mississippi College in Clinton and I have a Master's of Education in Secondary Education from the University of Mississippi.

Q. You have taught in the Drew System for 22 years? A. Twenty-two years.

Q. Prior to that, did you teach? A. I taught at Andy and Central School at Bentonia, Mississippi.

Q. How long there? A. One year.

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[94] Q. Now, in the white community at Drew, what are the values or moral standards concerning unwed parent status?

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[95] The Witness: The white community just does not approve of such. It is against the community's values. And morally the unwed mother situation is just not an accepted situation.

Mr. Terney:

Q. What effect do you feel it would have on the white students in the Drew Schools if unwed parents were allowed to teach? A. I think we would lose the ones we have.

Q. What would it do to those that may possibly come back into the system at a later time? A. It would keep those from coming.

Q. Do you know of your own knowledge? A. I have been told by mothers. One told me [96] last week prior to my knowing anything about this court that her child could not come back to the moral situation.

Q. Do you know of any other situations at Drew, white or black, where, other than the plaintiffs, an unwed parent has been denied employment on the faculty? A. We had a secretary once who had the same—at that time the secretary had the same qualifications as a teacher.

Q. Was this individual white or black? A. She was white. And she resigned voluntarily because of her condition.

Q. What relation do you feel that a teacher has to a student as far as the moral development, character development of that student is concerned? A. A teacher has a great responsibility in that sense because children want to be like the ones that they are around. They are great imitators. They have a tendency to mimic or to want to be like those they are around. And a teacher has as great a responsibility teaching moral values and character values, I would say, as subject matter. And you don't just—well, those little things come in as a teacher

is teaching. You just don't take out time necessarily for a lesson on that. But you can work in a great deal of teaching while I am trying to teach a mathematics problem.

[97] Q. Do you feel that a teacher does, in fact, have an influence over a student's moral or character development? A. Yes, very definitely.

Q. Have you seen this in your own experience? A. In my associations I feel that some teachers—the teachers that I respect more highly than others I can see the reaction of students to those teachers more so than one that they do not feel any confidence in or have respect for. I can't cite specific instances, but through my years of teaching I am very aware of which teachers are respected and admired and which ones are not.

* * *

Cross-Examination

* * *

[101] Q. That person is the same that you testified about as a person who has a child at home and is a teacher. Do you think a person who has a child at home and is a teacher would create the same type of disturbance? A. Yes.

Q. You do? How? A. That is not an accepted moral situation. And young people have tendencies to look for that in a person. And anything a young person can have against a teacher that would reflect upon his character, he is quite quick to bring up situations like that. Especially in conduct situations. And quite frequently you hear a child say, "I don't see why that teacher can tell me something because he does something." and situations like that can really be brought out in a hurry.

* * *

[103] Q. Mrs. Stancill, how many white unwed mothers do you know? A. I don't know. Not very many.

Q. Do you know any? A. Right offhand, I know of one person that I [104] was in school with, not a Drew person.

Q. You don't know any white people in Drew who have children out of wedlock? A. Offhand I can't name one.

Q. You have testified that you know the general goings on and the general feeling of the white community. A. Sure.

Q. Do you believe that there are any in Drew? A. Could possibly be some. I do not know. I'm not aware of it. If I could think, I might could name somebody. But I do not know one.

Q. Do you know whether there are any teachers in the Drew system that work with you who had children out of wedlock who were later married who are now teaching in Drew? A. Not in my building.

Q. Not in your building. A. That's right.

Q. You know that for a fact? A. I wouldn't swear to it.

Q. But if you found that out, do you think they should remain as teachers? A. No.

Q. You think they should be excluded? A. Sure.

[105] Q. I think you have testified that unwed parenthood is against the moral values of the white community in Drew. A. I think it is against everybody's moral values, going back to biblical teachings. I think there are a number of scriptures that refer to a situation of that type.

Q. Oh, so you are basing your thoughts on biblical teachings? A. The moral and ethical values I have had instilled in me all my life.

Q. Do you also believe in forgiving people for sins? A. Yes.

Q. How could you subscribe to what you just said and believe in forgiving also? A. Now, you are talking about forgiving and you are talking about hiring for a job.

Q. Right. A. I understand that there are a number of professions that people are not permitted to engage in because of previous records, regardless of how they have been forgiven.

Q. What about people who have committed crimes? A. I think the same thing holds there.

[106] Q. If you found that a person was an embezzler, would you want them teaching your children? A. No.

Q. You would not? Are there any people like that in the Drew Municipal Separate School District? A. I hope not.

Q. Do you know for a fact that there are not? A. No.

Q. But you do know how you feel about unwed mothers, don't you? A. Same way about embezzlers.

Q. What other jobs would you exclude unwed mothers from having? A. Any type of responsible job dealing directly with children.

* * *

[107] Q. Do you have any children? A. No.

Q. You do not have?

Are you married? A. Yes.

* * *

[108] Q. What other morals would—immoral acts or conditions would the white community feel that a teacher should not have? A. I think that teachers—well, there are a lot of moral things that come into one's

life. I think how he lives his private life involving the things that I personally feel are wrong, and I am sure somebody might think differently, but I do not approve of drinking—

Q. No, Mrs. Stancill— A. All right. A teacher has to be very careful about where they go, his private life, drinking, gambling, things of this nature would not be tolerated by the white community for teachers.

Q. What about fornication? A. No.

Q. What about premarital sex? A. No.

* * *

[110] Q. Now, does unwed parenthood have anything to do with the qualifications of a person to teach? A. His subject matter qualification? No. But a teacher is more than an imparter of subject matter.

* * *

[111] Q. Let me ask you another one. Do you feel that if you found out a single teacher had premarital sex, do you think that teacher should be excluded as a teacher from Drew?

* * *

[112] Q. Now, it has been testified by a number of people, I believe, that the students are inquisitive. And I believe you testified that the students are inquisitive and that they will find out about a person's immoral behavior, is that true? A. Well, most situations like that are rather obvious. A person reflects what he is nearly always. And it doesn't take a blind person or a deaf person to be able to see what a person is.

Q. Okay. Now, tell me how you arrived at that conclusion. A. I have lived 42 years and I have been observant for those years.

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DEPOSITIONS

U. S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI GREENVILLE DIVISION

(Title Omitted in Printing)

DEPOSITION of ERNEST van den HAAG FOR DEFENDANTS, called as a witness herein, taken pursuant to notice dated May 16, 1973, taken at the office of Dr. Ernest van den Haag, at the above place and time, before a Notary Public of the State of New York.

* * *

[3] ERNEST van den HAAG, being first duly sworn by a Notary Public of the State of New York, was examined and testified as follows:

Examination by Mr. Terney:

Q. Would you state your full name, please? A. Ernest van den Haag. I will spell the last name: v-a-n d-e-n H-a-a-g.

Q. Dr. van den Haag, where are you presently employed? A. I am Adjunct Professor of Social Philosophy at New York University; and I am a lecturer in Psychology and Sociology at The New School for Social Research, both in New York. And I am also a psychoanalyst in private practice.

Q. Doctor, could you give us some of your educational background, please? [4] A. Yes, sir. I was—I studied originally in Italy at the Universities of Naples and Florence. Later in Sorbonne in Paris. Then I came to this country and got a Master's Degree at the State University of Iowa, Iowa City. Then I taught at the New York University, and also got a Ph. D. degree from that uni-

versity. Since that time I have been teaching, writing and lecturing and practicing psychoanalysis.

Q. What professional papers or publications do you have? A. Well, I have written five—published five books. The first of which was called EDUCATION AS AN INDUSTRY.

Do you want me to list them all?

Q. Please. A. EDUCATION AS AN INDUSTRY, THE FABRIC OF SOCIETY, that was written together with Ralph Ross. PASSION AND SOCIAL CONSTRAINT, THE JEWISH MYSTIQUE, and my last book, which came out last year, was called POLITICAL VIOLENCE & CIVIL DISOBEDIENCE, Published by Harper & Row.

I have also written chapters in books edited by others, about fifteen or so. And I have written about seventy to eighty, I would say, papers [5] in learned journals and intellect journals.

Do you mean to ask about my memberships or—

Q. Yes. I was going to ask to which professional societies do you belong at this time? A. I am a member of a number of professional associations.

Association for Applied Psychoanalysis, I am also a Fellow of the American Sociological Association, and of the Royal British Association for Economics.

I am at this time a Senior Fellow of the National Endowment for the Humanities, and I have been a Guggenheim Fellow in the past.

Q. Doctor, would you name several of the journals that you have had material published in? A. The American Journal of Psychoanalysis. The American Sociological Review. British Journal of Sociology. Daedalus, a scholarly journal published by the Academy of Science. Harpers, the Atlantic, and Encounter, which is a British journal.

Frankly, if you will be good enough to give me—I would remember. My memory is not very [6] good.

Quarterly Journal of Economics; the Annals of the American Academy of Political and Social Science; Commentary; Trans-Action; Social Problems; various law reviews. Then, in the bulletins of various psycho—

Mr. McTeer: Excuse me. May I see that, please?

A. I don't believe I finished that sentence—

In the bulletins of various psychoanalytical societies.

Q. How long have you been a professor at New York University? A. I think it's twenty-seven years, now.

Q. How long have you been a practicing psychoanalyst? A. Perhaps a little less than twenty years.

Mr Terney: At this point, we tender this witness as an expert in the field of education, Sociology and Psychology.

Would you gentlemen like to cross-examine him as to his professional qualifications at this time, or wait until later?

Mr. McTeer: I think we would prefer to [7] wait. We will wait until later.

Q. Dr. van den Haag, are you, at least in part, familiar with the background of the lawsuit in question, with particular reference to testimony of certain witnesses and the pleadings and briefs that have been filed in this matter? A. Yes. You have informed me of these and I have seen the transcript of the testimony of Dr. Samuda, I believe is the name.

Q. You know then of the existence of a policy or rule within the Drew Municipal Separate School District concerning the employment of unwed parents for faculty positions; is that correct? A. Yes, sir.

Q. And that this rule, in effect, which has been adopted by the school board, denies employment to individuals who have had children out of wedlock? A. Yes, sir.

Q. Can you see a rational basis for this rule? A. Yes, sir.

Q. Would you state that, please? A. In American society, the family is a protected institution. Let me perhaps go back a little farther:

[8] In all societies, certain institutions are protected, and in all societies the sexual activities of the members are regulated and controlled by protected institutions.

In American society, monogomous marriage was a protected institution and still is, except that we now have some form of, what we call, serial polygamy. That is, people can marry upon divorce new partners, but they can only marry one person at a time, and the intent of the American society has clearly been to regulate, not only sexual activity, but also the having of children in such a way that children are the offspring of people married to each other.

Given this institution of the family centering around connubial marriage is protected in American society.

It follows that those who do not conform to that institution are legitimately made to suffer some disadvantages, particularly if they deliberately fail to follow that institution—to conform to that institution.

In the past, they were legally punished for fornification or cohabitation. I think this is no [9] longer done in practice. But they suffer all kinds of social disadvantages if they cohabit without being married to each other. These disadvantages differ somewhat from place to place. Usually greater in rural areas and less in urban areas. There are regional differences.

It seems to me that if the institution is protected legally, then it would be inconsistent if a government or governmental agency were to hire—were to employ people who refuse or have refused to conform to the prescribed institutional patterns. But it would be particularly

not just inconsistent, but in concert with the purposes of this society, if such people were hired in positions where they intentionally or otherwise, they serve as models for the young.

Now, teachers have basically two tasks: to teach cognitive knowledge to their students, but also to transmit and, inseparably from this cognitive knowledge, to transmit the cultural heritage of the society or community in which they are employed. This last function is particularly strong in the lower grades, grade school and high school. The reason for that is that when students reach a certain age, we assume [10] that they can, to a greater degree, be subject to all kinds of influences of their own choice outside the school, and that they have the maturity to select the influences to which they will yield. But in grade school and high school, they are necessarily subjected only to two main influences; namely, the home and the school.

And in the school, more specifically, the classroom teacher; the classroom teacher affects the emotional attitudes of his or her students, largely by his or her personality and conduct. Students, in this respect, are unlikely to make a distinction between conduct within and outside the classroom.

The authority of the teacher and his or her ability to teach depends very largely on being accepted by her pupils. And by accepting the teacher, the students tend to accept, not his specific competence, say, in arithmetic, or hers, but rather the teacher as a person. And in accepting the teacher as a person, the students without making distinctions tend to accept and take as a model to some extent, and identify with and, in fact, in effect, build their own identity on, the teacher's general conduct, behavior and so on, [11] to the extent to which they are aware of it.

Let me point out that students seem to have sources of information that I never have been able to fully find out, but they seem to always know everything about their teachers.

Hence, to come back to your original question, it seems to me, not only permissible but obligatory for a school board to hire only such teachers as the school board believes will offer wholesome models to the students, desirable in the view of school board models. Models that the school board feels the students would do well to imitate.

I do wish to point out, I do not want to pass judgment on what is right or wrong in this respect; I merely wish to say that given that a society has protected certain institutions, it is rationally entitled to select people as models for the children to be educated or socialized; that is, introduced to the patterns of that society, which is a technical term. It is entitled and, in fact, obligated to select such models as would induce these children into the desired social patterns.

Q. Doctor, what would be your opinion as to [12] the effect upon a student in a classroom in the Drew School District, whether the child's teacher, male or female, was the parent of a child born out of wedlock, but subsequently the teacher—the unwed parent had married either another individual or the other parent of the particular child? In other words, what I am saying, would the fact that an individual who has a child out of wedlock and subsequently marries and presents himself or herself for employment, what would be the effect of that situation upon a child in the classroom? A. May I just briefly summarize your question, and you correct me if I didn't fully understand.

You want to know what I think about the effects of hiring a teacher who has had a child out of wedlock and then marries. Now, you haven't told me whether

he or she marries the parent of the child or someone else, or does it matter?

Q. Correct, it doesn't make any difference. A. Did you say you want to know what the reaction would be in Drew?

Q. The effect in Drew to the classroom students. [13] A. The trouble is I have never been in Drew, so you will have to tell me a little bit about that.

Mr. Terney: Drew is a small, rural school district with approximately fifteen hundred students in grades 1 through 12. There is one high school, one junior high school, and one elementary school.

The Witness: How big is the locality?

Mr. Terney: The Town of Drew is approximately five thousand.

The Witness: I see, thank you.

A. Well, we are dealing here, then, with a small town and with a small school. This being the case, I would assume that the situation you have described would become known to the pupils through their parents or otherwise. Obviously, if a situation is not known, it would have no effect, but my assumption is that it would become known in small towns, whether by gossip or information. People do know about each other's lives. And students, as I mentioned before, are particularly curious about the lives of the adults with whom they are in contact. So, I think they would know.

Now, a great deal would depend on how the [14] matter is presented to students. If he makes the assumption that in that small town the behavior of the teacher who has had a child out of wedlock and thereupon married someone is regarded as immoral, then the students would find themselves in a conflict situation. On the one hand, they would reflect the opinion of the environment that the teacher's behavior is immoral. On the other,

they would be confronted with that teacher whom they have been informed has acted immorally, as an authority person who teaches them.

Now, there are two possible reactions: If they like the particular teacher we are talking about and accept him or her, the reaction would be that they would accept him or her totally, and therefore, accept the behavior that the surrounding community regards as immoral; and accept for themselves the idea that it is all right to have children out of wedlock provided they get married later on to someone.

Or, on the other hand, if they happen to not care for that particular teacher, then they would feel that the teacher's immoral behavior, immoral in the eyes of the community, invalidates his or [15] her authority and their ability to learn from that particular teacher would be impaired by their rejection of their teacher, reinforced by the rejection of that teacher by the community.

Q. What is the effect of this rule as far as the family institution is concerned? A. You mean the rule not to hire?

Q. Yes.

Mr. McTeer: I want to put an objection on the record for that. Go ahead.

The Witness: I am to answer?

Mr. Terney: Yes.

Mr. McTeer: My objection is based upon the fact that this question is irrelevant.

A. I think the aim of the rule is to protect the family as an institution as conceived of and protected in the community in question, and I think that rule would have that effect. It would be effective in the protection of the accepted sexual morals and family patterns.

Q. As a practical matter, Doctor, what are some of the occasions in the classroom or the school setting for

the unmarried status of a teacher of a [16] child to be communicated among the students?

Mr. McTeer: Just a second. I place an objection on the basis of incompetency.

Mr. Terney: You can answer the question.

The Witness: All right.

A. The two possible assumptions. Assuming that the teacher teaches, say, arithmetic, there would be in the official classroom communications no occasion to refer to the family status of the teacher. But, of course, the children would have knowledge, as I said before, through their parents and the community grapevine. And their attitude towards the teacher on the one hand and towards the protected values of the community on the other hand, would be affected.

But, I have considerable knowledge of grade and high school practices. It seems to me that even a teacher in arithmetic in graded high schools tend to communicate with the children on an emotional basis and quite often refers to everyday events, occurrences within his or her own family; asks the children to tell about their everyday life. That is the more so—the more the teacher goes into fields other than arithmetic. And the practice, of course, in lower [17] grades is for one classroom teacher to teach a number of subjects.

Teaching such subjects about, say, American history and social studies, family and, perhaps, today, I do not know whether this is the case in Drew, sexual education and education in family patterns. It is unavoidable, it seems to me, that the pupils will be curious about the teacher's own family life, past and present conduct, and it is unavoidable that the teacher, whether he likes it or not, expresses his own values in the classroom.

If the teacher feels it is all right to have illegitimate children or children out of wedlock, such a teacher can

hardly, at the same time, pretend to the children in the classroom that it is wrong.

Clearly, the children would notice the inconsistency.

On the other hand, if the teacher feels it is wrong himself or herself, and yet has had children out of wedlock, I think it would be hard for the teacher to present himself to the classroom as a repentent sinner, who has done something that is wrong. So, in effect, the teacher would be compelled, I would [18] say, to tell the children that it is all right to have children out of wedlock.

And that, of course, would have one of the two effects I mentioned before. If the children accept the teacher in general, they will accept his teaching. If, on the other hand, the teacher has been unacceptable for other reasons to the children, this behavior and this expression of values will make him even more unacceptable, to such a point as to compare his or her ability to teach the children anything.

Because, I do wish to emphasize that teaching, particularly in the lower grades, is not contrary to appearances; a purely cognitive matter, affecting and involving just the intellect.

Children learn and children learn only because they like their teacher and wish to please him. Children learn for the love of the teacher, so to speak. This is less so as the children grow older, but it never fully stops. It is hard to learn from a teacher you don't care for; Impossible for a young child, I would say.

Hence, between teachers and pupils, there is necessarily, though not necessarily consciously, [19] an emotional relationship. The teacher cannot teach unless he or she likes children. The teaching of the teacher affects the child as a whole.

I hate to repeat an old cliche to the effect that one does not teach subjects but teaches children. I think that

has been driven a little too far, so that many teachers no longer know subjects. But it is true to the extent, certainly, that the children in the lower schools—the teacher cannot teach any subject unless a child accepts him, likes him, and admires him. He takes him as a model. You have to remember that children, in the process of being socialized, assume and learn to assume social roles; assume and learn to assume an identity of their own. That identity is formed by, as it were, incorporating part of the personality, conduct and values of adult models.

It starts, usually, within the family, but it goes on, of course, until at least adolescence. And, in fact, resumes in adolescence by accepting as models all kinds of admired persons; at first, those in physical proximity, such as parents and teachers, later on more distant heroes. This is what we say, [20] Erik Erikson and other psychoanalysts have taught us. I think this is now very generally accepted. That is, how personal identity is formed so that if, say, your teacher is a Nazi and you happen to like and admire him, the chances are that you will form a Nazi-like personality and vice versa, and so on.

Q. Doctor, when you state that the conduct or the fact that an individual is the unwed parent of a child, and this is wrong, this is not a moral judgment as such, is it? A. No. I think there are a great number of societies having a great number of ways of regulating sexual conduct. Throughout the history of the world, we have seen societies with polygamy; societies with polyandry societies with all kinds of sexual regulations.

What usually happens is that the more advanced civilization, the stricter is the sexual relation. But in all societies, there is some sexual regulation. And I am not passing any judgment. I think it would be very hard to pass a judgment on what regulation is right or wrong. All I am saying is that in each society a particular regula-

tion prevails, and that the society must educate its children so as [21] to fit in that particular regulation or institution.

Q. Doctor, you stated that you are familiar with the transcript of the testimony of Dr. Ronald Samuda. A. Yes, sir.

Q. And he made reference to the fact of the different moral codes or standards within certain economic levels of the black community as well as and compared to various economic levels of the white community.

Could you comment on that, please? A. Well, in a large society, such as the American society, culture is derived from a variety of sources and is certainly not homogeneous. There are a number of sub-cultures. These are ethnic, economic, regional, urban, rural and so on. Say, Italians in New York, people of Italian decent have a somewhat different sub-culture from people of Irish descent in New York; from blacks. Blacks themselves have different sub-cultures, depending on whether they are middle-class, lower-class, religious, non-religious, urban, rural and so on. So, it is entirely correct to say there are different sub-cultures, all of which are part, [22] diverged slightly within a range from the general culture.

Q. Would there then be a value conflict between a teacher of one race or economic level as compared to the students in his or her classroom that may be of different races and economic background? A. I don't think that values are racially determined. If it were so, of course, then it would be necessary to reintroduce segregation. I think that there are divergences among whites as well as among blacks, and divergences between whites and blacks, but not such as to invalidate the attempts to educate them together. That attempt, of course, means that it is possible for a white teacher to teach black children and it is possible for a black teacher to teach white children. It is possible to teach black and white children together;

that their values are not so divergent, that it is impossible to teach them together.

Now, teachers, generally speaking, tend to be lower middle-class or middle-class, and that is so whether the teachers are white or black. Middle-class and lower middle-class are very vague designations. But historically speaking, for instance, the teaching job for most people, white and black, has been [23] the first stepping stone on the ladder from the lower to the middle-class. Most of the pupils of the teachers are lower-class. By definition, almost the majority, a number of people are lower-class than middle-class. The social pyramid is a diminishing pyramid.

And it has always been the pattern of teachers to teach the values that are the official accepted values and ideals of the society to pupils for whom these ideals—well, who learn these ideals, very largely in the school, if they have not previously learned them in the home. I don't think that involves a conflict that involves what we call the learning process. It involves no more conflict than to learn that two and two makes four, when previously you had not known that.

You go to school to learn the cultural heritage of the society of which you are a part. The cultural heritage is always selected. Surely, in our society there has been burglary, murders, all kinds of illegal activities, which in a large sense are part of our culture. But, it is not the task of the school to transmit to its students techniques of [24] burglary or the acceptance of burglary or murder or generally of violence. Rather, it is a task of the school to selectively transmit the cultural heritage. For instance, the ideas of honesty, proper behavior and so on. In this respect, with respect to sex, too, the ideals of restraint of avoidance of certain sexual practices, including avoidance of illegitimate children.

Q. Doctor, Dr. Samuda made the observation in his testimony that about one-third of the births of black people are from unmarried parents, and he draws a conclusion, that would mean the school board would then be excluding them from employment, at least one-third of the black race.

What is your comment on this observation? A. Do I understand correctly that his contention was that one-third of the black children are born out of wedlock?

Q. Yes. A. And that, therefore, to exclude parents of children born out of wedlock, would exclude one-third of the black race from employment?

Q. This is a conclusion that he reached, yes. A. The conclusion is nonsensical. All I can say, [25] if he accepts that one-third of black children are born out of wedlock, and of course, it does not follow that one-third of all blacks are parents of children out of wedlock. The black community consists of people of all ages and, at least, of two sexes. Not all of them are parents. And it is entirely conceivable, for instance, for one parent to have five children out of wedlock. It is, of course, statistical or legitimate to say if there are five children out of wedlock, there must be five parents out of wedlock. Hence, the conclusion: If one-third of all black children are born out of wedlock, that one-third of all black adults are parents of children born out of wedlock. It is statistically nonsensical.

Q. Dr. Samuda, further testified, that Dr. Kinsey had shown that premarital sex and extra-marital sex is far more frequent and extensive among upper middle-class than among working class. And further, that the moral values of the working class, in particular the black communities are far more rigid than that of the upper middle-class.

He, on that basis, draws the conclusion that there is no correlation between having borne a [26] child and teaching. A. I don't understand the last conclusion, but I will—I would like to come back.

As for the first point, it was, if I understand correctly—would you repeat it, please. I'm sorry.

Q. Dr. Samuda testified that Dr. Kinsey had shown that premarital and extra-marital sex is far more frequent and extensive among the upper middle-class than the working-class.

Mr. McTeer: Counsel, would you please give me the page number?

Mr. Terney: Page 6 of direct examination of Dr. Samuda. Pages 5 and 6.

A. This is an assertion of findings of the Kinsey Report. It is untrue. The findings of Kinsey are diametrically to the contrary. What Kinsey has stated in his report and found was, very briefly, sexual conduct is correlated to the education far more than to the income group. And that, simplifying it a little bit, in the lower or less educated group, there was considerably more promiscuity, including premarital or extra-marital sex in the upper or more educated [27] group, which is often more middle-class, there was considerably less promiscuity, premarital or extra-marital sex. The very opposite of what you have just quoted to me.

Now, Kinsey also found that perhaps that is what confused Dr. Samuda; that in the less educated or lower group, sexual patterns are more rigid, not by being less promiscuous but by the variety of sexual practices being more limited. Whereas, in the middle-class and more educated groups, Kinsey found that although people were less promiscuous and approved less and practiced less extra-marital intercourse, what intercourse they did have,

was less rigidly limited, and that they approved of greater variety without regarding that variety as pervert, morbid or wrong.

According to Kinsey, in the less educated groups, he found, for instance, some people don't even undress for intercourse; that various forms of kissing and so on are regarded as "unnormal"; whereas, in the more educated groups a greater variety of sexual technique, let's say, was accepted. But, on the other hand, there was also a greater adherence to the accepted social pattern of monogomy or exclusion of premarital [28] intercourse, or at least of promiscuity.

Q. Did Kinsey's research deal essentially with the white community or the black community? A. Essentially with the white community. I don't quite recall whether he interviewed some black people too, but I would be very leery of applying Kinsey's report to the black community, which I think is, in this respect, quite different from the white community.

Q. Dr. van den Haag, could you comment on the rule —when I say the rule, I mean the rule in question that has been adopted by the Drew School District—could you comment on the rules of facts as it applies to a situation when an individual has premarital sex and uses contraceptives and therefore there is no product of this sex act as far as a child is concerned? On the other hand, the fact that another individual may engage in the same sex act outside of marriage and have a child, and, therefore, be penalized by the rule. A. Well, it's like—I would be tempted to say it's like with any crime. You can't convict someone unless there is evidence. It is perfectly true that other people may be committing crimes and not be [29] convicted for lack of evidence, and therefore they will not suffer, in many cases, and not go to jail, and so on.

The point of the matter is very simple: it is very easy to, or perhaps not in a small town such as Drew, to hide your sexual activities unless you have sexual intercourse on a lawn in front of the school. It is not likely to be known, but on the other hand, if you have an illegitimate child or child out of wedlock, it is clear to anyone that you must have had sexual intercourse out of wedlock, as the evidence is living and around.

You are entirely right in your suggestion that others may get away with it because they have not produced the evidence by taking appropriate precautions. It is entirely possible that a burglar might get away with it. Having taken appropriate precautions, he has not been apprehended, or if apprehended, he has not been convicted because of lack of evidence. The ones who have been convicted because of the presence of evidence, will suffer considerably more than the one who has not been. But as far as the children are concerned, what matters here is they [30] will not be influenced by the sexual life of a teacher, of which they have no knowledge. They will be influenced by the sexual life of a teacher if they do have knowledge: The knowledge consisting of having witnessed activities or utterances or of the presence or the knowledge of the existence of the children born out of wedlock.

Q. The rule then regulates a status rather than a moral condition; is that correct? Is that a correct assumption? A. You would have to explain a little bit more.

Q. When I say it regulates a status, I mean the fact that the individual has an illegitimate child, it regulates this situation rather than the situation of an individual engaging in premarital sex? A. In practice, yes. Because in practice, it is impossible it seems to me to regulate whether a prospective teacher has extra- or premarital

sex. No school board would have the means to investigate that and to find out.

On the other hand, the status, of course, is public knowledge and the status can be regulated.

Mr. Terney: We have no further questions [31] at this time.

Mr. McTeer: Give us five minutes, please.

(Whereupon, a five-minute recess was taken.)

By Mr. Terney:

Q. I have one more question:

Doctor, the allegation has been made by the plaintiffs in this case that the rule in effect is discriminatory against females. What is your feeling concerning this? A. Does the rule say parents?

Q. Unwed parents. A. So, it does not, certainly, on the surface, discriminate, but—well, in a sense, nature has discriminated without any governmental activity, inasmuch as it has decreed that women bear children rather than men. But if I understand correctly, the prospective teacher or the teacher being employed is asked, "Are you or are you not a parent of a child out of wedlock?".

Q. Correct. This appears on the application, form that they complete at the time they apply for a job. A. Well, it seems to me that either a male or a female could truthfully acknowledge or untruthfully [32] deny or lie about it.

A woman who has borne an illegitimate child, for instance, can give the child away for adoption; and a father of an illegitimate child can either keep the child with him or not keep the child with him; can either admit to the school board or lie to the school board, just as a mother can about the illegitimate child. However, I think that the mother certainly knows whether she has borne a child out of wedlock, and as I say, she can either

choose to acknowledge it or lie about it, provided she has given the child away, or the child lives not with her. And it seems to me that a father usually knows whether he is the father of a child.

I can hardly believe that a prospective teacher had sexual intercourse with a man so loose and so exclusively sexual and temporary and would not have notified the man that he has become the father of a child. And I can hardly believe that a male prospective teacher would have had a relationship with a woman so superficial and promiscuous, as not to know that he has become a father of a child after she has given birth to it.

[33] Hence, it seems to me there is no particular distinction, either male or female can truthfully state or lie to the school board, and there is no sexual distinction. It is a distinction in terms of truthfulness.

Mr. Terney: I have no further questions.

Cross-Examination

Examination by Mr. McTeer:

Q. Good morning, Dr. van den Haag, how are you? A. Fine.

Q. Dr. van den Haag, let me ask you this question, first of all:

Do you consider yourself an educator? A. Yes, I do.

Q. Do you also consider yourself a public educator? A. Yes, I do.

Q. Would you please state for the record all the degrees that you have received in specific educational fields? A. I will make that simple and say, I have never attended a school of education, and I have never applied for or received a degree in education. But I would

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[34] Q. Well, Doctor, let me get this point across and perhaps you can answer the question very specifically.

Have you ever had a course in early childhood development? A. Never.

Q. Have you ever had a course in childhood [35] development at all? A. I have given such courses.

Q. You have given such courses? All right.

Have you ever had a course that dealt with elementary education? A. I have given such courses.

Q. Please cite the course? A. I have given a course in early childhood education, which improves the mentally deficient, to my knowledge, at New York University several times.

Q. What is the age group of students that you have had most of your experience with as a teacher? A. Most of my experience has been with college students which, I think, range from seventeen and up.

Q. Have you ever had experience in elementary school teaching? A. I have never taught elementary school.

Q. Have you ever had any experience at junior high school teaching? A. Never.

Q. Any experience at senior high school teaching? A. I never taught except in college. Educationally, say, perhaps I have given lectures in high school, and [36] visited high schools.

Q. Further, you have had no experience in pre-school teaching; is that correct? A. That is correct.

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[37] Q. Have you ever had any particular involvement in the education of students within the South? A. I have never lived in the South.

Q. So, you have never been involved in elementary, junior high school, senior high school, or preschool in the South? A. Yes, sir.

Q. Have you ever been involved in any college education in the South? A. I have given some lectures, but I have never [38] taught there.

Q. Have you ever had any conversations with any of the members of Drew Municipal School Separate District or any of the administrators prior to the action about which we are here? A. No, sir.

Q. So, you have given no advice to any of these particular parties or to any particular policy which they have? A. No, sir.

Q. Do you consider yourself, on the basis of your previous testimony, to be more a theoretician in the field of sociology and psychoanalysis and psychology in reference to education, or do you feel yourself to be a practitioner in terms of education on the elementary, junior high and senior high school level? A. It seems to me a sort of impossible dichotomy for the simple reason the theory is about practice. It is an analysis of practice and an attempt to distill and find things correct and incorrect. If this is what you mean, I am certainly a theoretician.

Q. Thank you very much.

[39] Do you consider yourself an education specialist in any way? A. I really wouldn't know.

Q. All right.

Do you consider yourself to be a specialist in the field of reading? A. Certainly not.

Q. A specialist in the teaching of mathematics? A. Certainly not.

Q. Then what field do you consider yourself to be a specialist in? A. I am Adjunct Professor of Social Philosophy. That means to the extent to which you can call it a specialist, that means I am concerned with the norms and ideas prevailing in a society; ascertaining what these norms are; ascertaining whether they are justifiable

in terms of other norms; investigating how they are operative in various groups and societies, and so on. This specialty, if you can call it a specialty, and I am not sure, branches out, so to speak. My interest in sociology is, of course, an interest in the behavior of social groups in various social institutions, including education, but many others. And my interest [40] in psychoanalysis involves an interest in the effect of social institutions, such as the family, the school and so on, on children, and ultimately the effect of childhood on adults.

Q. So, then it would be a very clear statement to say that indeed you are a psychologist and indeed you are sociologist and indeed you are a psychiatrist. A. No, I am not a psychiatrist.

Q. A psychoanalyst. I'm sorry. A. A psychoanalyst and not a psychiatrist.

Q. Excuse me. But would you say very clearly that you are a sociologist and that you are a psychoanalyst? A. That is correct.

Q. Very good.

Do you think that most of the opinions which you have expressed here as to the education of elementary school students, junior high school and senior high and preschool students, is based upon your extrapolation of facts and figures, which have been collected by practical practitioners? A. Every scientist relies on data collected by others and, of course, on his own test of these data, and I [41] certainly do, too.

Mr. McTeer: On the basis of that testimony, I am going to object to Dr. van den Haag's testimony as an educational expert. Indeed, Dr. van den Haag is an eminent sociologist and, if I may say, psychologist and psychoanalyst; however, he has not shown himself to be eminently able to speak on the questions of education of people and practical aspects of said education.

Q. Doctor, one more question on that particular point: Could you please state for me your involvement with black students in elementary, junior and senior high schools and pre-schools? A. As I responded to your previous questions, I do not teach, except in colleges, and that goes for white and black.

Q. Thank you very much.

Now, on the point of role models, Doctor, which you did bring up earlier in your direct testimony, you seem to have given me the impression that mothers or unwed mothers or unwed parents, per se, make [42] improper role models. Would you please identify for me the components of a proper role model? A. I am not sure that I used the expression "role model." And I certainly am not sure that I could list for you the proper or improper components of such a model, because there is an enormous degree of individual variations.

Did you have in mind here a role model for her own child?

Q. A role model for her as an instructor in a school system. A. I see. Well, I would regard here as a proper role model, would be a person whose conduct conforms to the norms of the culture she is expected to transmit.

And what I would regard as improper role model, would be a person whose conduct does not conform to the culture and in the institution of the culture that she is to transmit to her or he is to transmit to her or his pupils.

Q. Well, Doctor, on the basis of that testimony, that's a very strong allegation.

Could you possibly give me some institutional studies or other studies that have been made which [43] support the proposition that an unwed parent is an improper role model for a student as a teacher? A. I must admit I don't understand your question, for the very simple

reason that once you say unwed parent, you have said improper role model. If we assume that the society wants parents to be married to each other, then a parent who is not so married is by definition an improper role model. The only thing that remains to be discussed is what the degree of his or her influence may be on students.

But it would be as though you were to ask me, why is a burglar an improper role model for students. Well, I could only answer that burglary is illegal in this society, and we don't want students to be taught that burglary is a valuable or good activity. The extent of the burglarizer's influence on the students is something else. But that the role model is improper, I think, as a matter of law, so to speak, the same I would say about an unwed mother. If the institution of the family and if wedded parenthood is projected, then it follows that a person who is an unwed parent is an improper role model, and I can't imagine any studies.

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[45] Q. Now, Doctor, do you know of any studies that have been done by any institution or any other person that show the impact upon children of unwed parent-teachers? A. No, sir.

Q. Very good. Thank you.

Now, let me ask you this question:

Do teachers really have a great impact upon their students as to the morals and values of those students? A. The impact varies with the degree of like and admiration that the students have for the teacher. But the impact is invariably great in elementary grade schools and up to, I would say, junior high school. It decreases with age somewhat. There are, I think, numerous biographies and autobiographies of people who report on the man's impact that an admired teacher had on their own development and personality. I think it is indisputable

that when you have daily and intimate and extended contact with a person much older than you and you are very young and plastic, so to speak, that person will, whether he or she wants to or not, influence you and participate in the formation [46] of your personality.

I would go a step further and say that is the task of the teacher people. We send children to school, not only to learn arithmetic and other cognitive things, but also to become useful and acceptable members of our society; that is, to learn the accepted patterns and to internalize them. They internalize them not so much by what the teachers formally teaches but what he is and does in their relation to him.

Q. Doctor, may I ask you this:

Do you know of any studies which support your point of view, that a teacher has a clear impact morally on the value system of the student? A. I would say that such studies are impossible in the nature of the matter. They are impossible because, you see, the value system of the student and his personality, is affected by innumerable influences, the extent of which varies with the amount of contact that the student or child has. But we have, for instance, never been able to find out what specific chartered influence leads one student to become a criminal, another to become a homosexual, and still another to become a well-adjusted law abiding heterosexual. We have [47] all kinds of hypotheses, and each individual case, we are—not in each but in most individual cases, if we have protracted psychoanalytic interviews with the individual, we are usually able to trace specific influences whether of teachers, early childhood figures, parenthood and so on. But no general statement is possible, and I don't think any general study has dared to quantitatively determine the influence of schools versus home versus general environment and so on, because they would vary from child to child.

Q. On what do you base your opinion? A. On my psychoanalytic experience very largely.

Q. Thank you.

Do you know of any area in the United States or otherwise, where the practice of allowing unwed mothers to teach is allowed? A. I think it is probably allowed in New York City. I am not sure.

Q. What is the extent of the impact of the unwed mother on the New York City student? A. I do not think it would be easy to find out. Because, as far as I know, the school board in New York City does not ask the question, so we don't know how many unwed fathers or mothers teach. And I doubt that [48] they teach constantly in the same classroom as would be the case in a small town, such as Drew. So I don't know whether we can trace the influence on the pupils.

Q. Do you know how long the New York rule or New York lack of a rule has been in effect? A. No, sir.

Q. Doctor, let me ask you this question:

Is it your opinion that the basic morals and values of children are taught in the home or taught in the school? A. You are making this a disjunctive, or, and I would make it a conjunctive or—and/or. The basic values are taught those in the home and in the school. I think both are very influential. I think the school is more influential probably with lower-class children, and the home is probably more influential with a middle-class child.

The reason being that middle-class parents, usually have more time and take more trouble in educating their children; and the low-class parents usually have less time. This is only a frequency statement, of course, and therefore have somewhat less influence [49] on their children, and therefore, the school has more influence on the children.

Q. In other words, the lower-class children then basically for most the morals are taught in the school? A. I think that would go a little farther than I am willing to go. It depends very much on the individual. If you have a strong minded father or mother, and that strong father or mother, say, is religious or so, can greatly influence and totally prevail in the formation of the child's personality and value system, at least in a young age. On the other hand, if you have indifferent, not very strongly opinionated or minded parents, then the school can be very influential. So I can't really say for certain.

* * *

[50] Q. Yes. Sir, where were you educated primarily—your primary education? A. Primary education?

Q. Yes. A. In Italy.

Q. Under what system of education were you? Describe the system of education and which techniques were used in your education? A. You are making great demands on my memory. I was tutored privately for a very long time. I then went to the Italian Classical Gymnasium and Lyceum. In Italy the schools are all run centrally by the Ministry of Education, and the teachers become employed by passing certain examinations and being accepted again by the Ministry. The final examinations are given by the Ministry. That is, the Ministry sends a sealed envelope to the teachers and they are opened [51] at the same time all over Italy, if you pass the examination.

If you specify what you have in mind, I will try to be more informative.

Q. You have been quite informative.

Now, Doctor, I am going to ask you a series of questions and it will be very simple for you to answer yes or no.

Have you ever said, and I quote,—"Unequal scholastic opportunity, segregated or otherwise, in no way accounts for unequal achievement."

Yes or no, Doctor? A. I think this is a quote—

Q. Doctor, answer yes or no. A. —from a work by Christopher Jenks, called INEQUALITY, and I think I quoted him to that effect or paraphrased him.

Q. Doctor, have you ever said, and I quote,—"The family background of students determines academic achievement. The school does not." A. That is another paraphrase or quote from a work by Christopher Jenks called INEQUALITY, and I believe I quoted or paraphrased him to that effect.

[52] Q. Doctor, have you ever said, and I quote,—"I have argued since 1956 that the interior opportunity given blacks did not necessarily account for their interior performance; if a man in a dark room cannot see, chances are that the darkness is the cause; but he also could be short-sighted or blind, in which case light would not help, Jensen et al. have shown that this logical possibility is an empirical actuality." A. That is correct.

Mr. Terney: I would like to enter an objection to these questions as being completely irrelevant to the testimony of this witness at this time.

The Witness: Do you want me to answer this?

Mr. Terney: Yes.

A. Yes, the quote is correct.

Q. Doctor, do you subscribe to the theory that variance in the measurable intelligence of individuals is largely genetic, and that it might explain differences in academic performance? A. That is correct.

Q. Doctor, do you subscribe to the theory that heredity rather than environment is the overwhelming [53] factor in human intelligence?

Mr. Terney: We continue to object to these questions as being completely irrelevant.

A. No, sir, not in this form, but I would be delighted to give you an answer if you would let me expound on that.

Q. Just a second. You did not make the statement or you did? A. I don't know whether I made the statement, but you asked me whether I subscribed to the theory.

To the theory, I would like to say that I am not sure about overwhelming. I am not sure about the definition of intelligence. If you mean what is tested by the I.Q., then I should think this is determined to be between fifty and eighty percent by hereditary.

Q. Doctor, do you subscribe to the theory that the relatively high birth rate among ghetto blacks and others threatens downbreeding of the human race, and is creating millions of low intelligence babies? A. I haven't given much thought to that, and I would have to think about that, so I can't say offhand. There are various reasons why I think that is fairly unlikely, [54] but I'd rather not comment on it.

Q. All right.

Do you subscribe to the theory that a massive program of artificial insemination of mentally deficient women will be necessary to improve the intelligence of their offspring?

Mr. Terney: Objection.

A. I never heard of this theory and I certainly wouldn't subscribe to it.

Q. Are any of these points the theory of Dr. William Shockly, do you know? A. I do not agree with Dr. William Shockly's theories.

Q. Do you agree with some of the theories of Dr. Jensen? A. I agree with practically all of his theories.

Q. Is it true that one of Dr. Shockly's major supporters is Arthur R. Jensen, a University of California Educational Psychologist, whom you cited in a previous article, "The Tortured Search for Cause of Inequality" as support for your statement that the variance in measurable intelligence is largely genetic? A. I certainly quoted Dr. Jensen. I, as I indicated, agree with most of Dr. Jensen's theories. I do not [55] agree that his theories are identical to those of Dr. Shockly. He is known to me logically as a local prize-winning physicist.

Q. Have you ever made the statement that the proportion of slow learners is greater among the Negroes—these data are generally accepted?

Mr. Terney: Objection. I would like to show at this point a continuing objection to these questions.

The Witness: Would you please read it back?

Q. The proportion of slow learners is greater among the Negroes—these data are generally accepted. A. I certainly have not made this statement, but I would like to give you a statement, which I am sure you are aiming at.

The tested intelligence of Negro pupils is known to be between ten and fifteen points below, on the average, of that of white pupils. That may have effects on the learning process. Whether it will make them slow learners is a different question. It certainly has no specific effects on an individual member of the Negro community.

The data, incidentally, which you quoted, [56] comes from the James Coleman report and are, as you indicated, generally accepted.

Q. Doctor, have you ever made a statement that mixed education would impair the education of Negro and white children? A. I am trying to recall. I am not altogether sure whether I made such a statement. But if I did, I would like to modify it.

A great deal depends, in my opinion, on the conditions in which that mixed education takes place. And I should certainly favor mixed education of people of the same I.Q. level. And I should probably oppose or favor different tracts for people of different I.Q. levels.

Also, and perhaps this is what you are referring to, I believe there have been several articles in the Harvard Educational Review to indicate that Negro pupils speak a wholly different language; different from standard English. And to the extent to which that is true, they would suffer if they were educated in standard English and probably, I refer to that in the statement, which I don't recall, but may have made.

Q. Doctor, have you ever made the statement [57] that the quality of education can be improved for all—only if people are separated according to ability, and this very largely means race? A. Again, I don't recall whether I made this exact statement, but I certainly would agree that the quality of education is best and perhaps only improved if pupils are separated according to their ability, and that, at the present time, ability, as measured by I.Q., does follow racial lines often, at least, on the average.

Q. Doctor, have you ever made the statement, and I quote—"Instruction in schools for Negroes should attempt to remedy the disadvantages suffered by students coming from a culturally deprived home environment. This cannot be done except by separate education"? A. Yes, and I would enlarge it and say that it is equally true for whites coming from a culturally deprived home environment.

Q. Doctor, have you ever made the statement, if one uses an explicit criteria, certain achievements such as the invention of a written language or of the wheel, the creation of literature or arts and humanities [58] or mathe-

matics, the rule of law or medical progress, et cetera, then cultured achievements of Negroes in loco compare unfavorably with those of Caucasians, Chinese, Near and Far Eastern groups, et cetera? A. I believe I made that statement.

Q. Doctor, have you ever heard of the EMPIRES OF MALI, SONGAY OR GHANA? A. Yes, I have.

Q. Have you ever heard of the University of Timbuktu? A. Yes, I have.

Q. Was the University of Timbuktu an African University? A. This is a very controversial matter. Some historians maintain that it was an indigenous African institution. I have never called it a university before. Others maintain it was Arabic. My historical competence is not sufficient to pronounce myself on that.

Q. Would you then admit that the statement is, perhaps, incompetent? A. I certainly am willing to admit that I have conceivably made a wrong or incompetent statement. [59] But let me say once more, to my knowledge—to my present knowledge, I would confirm that African cultures, at least with those I am familiar with, are belittled.

Q. Of the twelve hundred African languages which have predated the present, and also were evidenced at the time of the University of Timbuktu, are you aware of any evidence which would show there were no written languages at that time? That would be, of course, in the twelfth, thirteenth and fourteenth centuries? A. I am not aware of any evidence that there was a written language.

Mr. Ladner: We would like to enter another objection based on the fact that this case involves public education in the United States, and to our understanding, no other kind.

Q. Doctor, have you ever made a statement, and I quote—"There is no reason to believe that God ever was an Equalitarian"? A. Correct.

Q. Doctor, have you ever made a statement that if there is a genetic difference between white [60] and Negro intelligence, the admixture suggests that American Negroes are likely to be smarter than African Negroes, though less intelligent than whites? A. Could you repeat that, please?

Q. If there is a genetic difference between white and Negro intelligence, the admixture suggests that American Negroes are likely to be smarter than African Negroes, though less intelligent than whites? A. Oh, I see what this refers to. I will have to explain that. I cannot answer this yes or no.

Q. First of all, Doctor, did you make the statement? A. I am not sure, but I think I could have—and I would like to explain in terms of my present notions.

I believe that one of the attacks against Arthur Jensen's theory was that he tested and relied on the tests made with American Negroes, and that these American Negroes were not racially pure but rather there was about thirty percent mixture of white genes.

Now, I pointed out that since the tests found on the average the measured intelligence—measured to the I.Q., to be between ten and fifteen points below that of whites. Then to indicate that [61] the tested blacks had admixture of thirty percent of white genes, would simply mean that if they didn't have that admixture, the difference between their tested intelligence and that of whites, would have been even wider.

That was the meaning of the statement which you just read to me, which I very well may have made in this context.

Q. Doctor, a couple of more questions:

The Jensen theory, which you have supported in numerous articles, is it not true that the Jensen theory is indeed one of the most controversial questions that has presently faced the educational sociological fields in America? A. Well, it's not very controversial among geneticists and among scholars. I think it is very controversial among journalists and idealogues.

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[62] Q. Doctor, have you done a great deal of writing in the National Review? A. Yes, I have.

Q. Doctor, have you ever made a statement, and I quote—"The attempt to establish inequality by law is immoral. The attempt to establish equality by law is ineffective, i.e. stupid as well as immoral"? A. I don't recall whether I made the statement. I am just thinking whether I should make the statement. Would you read it back to me?

Q. The attempt to establish inequality by law is immoral. The attempt to establish equality by law is ineffective, i.e. stupid as well as immoral. A. I would like to modify this a little bit.

Q. First of all, Doctor, was it possible that [63] you made the statement? A. It's entirely possible, but I am not sure. As to my present opinion, if you mean by "inequality"—or if I meant by inequality or equality in all respects, other than before the law, I would subscribe to the statement you just read. But I certainly did not mean that the law cannot establish equality before the law and equality in specific legal respects. That the law can do, and it is my opinion that the law should do that.

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Redirect Examination

[64] Q. Likewise, your views on the impact of genetic factors versus environmental factors, do not relate to this regulation, do they? A. I can't see whether, because someone becomes an unwed parent or anything else, would be related to genetic factors. Genetic factors are likely to influence a person's physique, skin color, and as we have now found, his ability to learn, which we call intelligence, as measured by I.Q. They do not, as far as we know, influence a person's conduct or judgment. I don't know much about talents and so on, but I think that most of these matters are largely to be co-determined by both genetic and environmental factors.

Q. To your understanding, does the regulation have a racial tenure at all? A. I was not aware of it, and I don't see, on the face of it, unless it is applied, of course, and that [65] would be true about any other regulation on a discriminatory basis. If it's applied equally, I think the chances of a white or black being an unwed parent are about equal.

Q. Have you had occasion, in your professional experience, to work directly with young children of school age? A. Yes. In my psychoanalytic practice, but not in my actual teaching.

Q. You testified earlier that you have taught teachers. A. Yes, I have.

Q. Was this in a graduate setting, non-lecture type of instruction? A. In graduate seminars as well as lectures.

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[71] Q. The testimony in this case also shows that there is a very severe problem of unwed parentage in the Drew district, within the age range of twelve years to seventeen years.

Would your view of the rationality of the regulation at all be affected by that knowledge?

Mr. McTeer: Objection. Again, irrelevancy, also improper redirect.

A. Yes. I would assume that the school district wishes to diminish the unwed parenthood in these age groups. I may point out that at least in New York, I don't know about that school district, these would be cases of a statutory rape, up to the age of at least sixteen, which, of course, in New York's jurisdiction would be regarded as a crime. Therefore, it would be part of the school authority's activities to start [72] to reduce and control this delinquent activity, and leads, ultimately, to unwed parenthood among such very young children.

Now, I would say that if you have unwed parents as teachers, that would certainly make it very hard for these teachers to, in effect, teach their students not to do what they have done. Hence, I would think that if the situation, is as you described, this would be a valid reason not to hire unwed parents as teachers, because your purpose is to reduce or control the frequency of unwed parenthood among pupils, and you certainly don't do that by having unwed parents as teachers.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

(Title Omitted in Printing)

DEPOSITION of DR. KENNETH B. CLARK FOR PLAINTIFFS, a witness, taken by the Plaintiffs pursuant to notice, held at the offices of Dr. Kenneth B. Clark, 60 East 86th Street, New York, New York, before a Notary Public of the State of New York.

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[2] DR. KENNETH B. CLARK,

the witness herein, having been first duly sworn by Henry Jacobs, a Notary [3] Public of the State of New York, testified as follows:

Direct Examination

By Mr. Walls:

Q. Will you state your name, please? A. My name is Kenneth B. Clark.

Q. Is that Dr. Clark? A. Well, yes, I have a Ph.D. in psychology.

Q. Dr. Clark, where is your place of residence? A. In Hastings-on-Hudson, New York.

Q. What is your official position? A. I am a distinguished professor of psychology at the City College of the City University of New York, and I am also president of the Metropolitan Applied Research Center in New York City.

Q. Dr. Clark, could you give us some of your educational and professional credentials? A. Well, I attended the public schools, including high schools, of New York City. I did my undergraduate work at Howard University in Washington, D.C.; recieved a master's in psychology

there, and Ph.D. in psychology from Columbia University in New York City, 1940.

Q. Could you briefly give us some of your recent writings or publications? [4] A. Well, I have published a number of articles on race relations in America, with particular emphasis on problems of prejudice, discrimination and segregation in human behavior, human personality.

My research has been primarily in the area of the effects of prejudice, discrimination on the human personality. In the last ten years, on community problems, ghettos, the effect of ghettos on human beings, the effect of racial prejudices and discriminations on human behavior in a social setting.

Q. Would it be correct in stating that your area of expertise is educational psychology, sociology? A. Education in terms of the association of human beings, how education and other social influences affect human images of themselves, attitudes and behavior, and that is my primary concern.

I have gone from that primary concern into the whole area of education, modification of human behavior.

Q. Are you the same Dr. Kenneth B. Clark who testified in the celebrated case of Brown vs. Board of Education? A. Yes, I am.

Q. Could you briefly give us the crux of [5] that testimony? A. The crux of it is what I have already said, that on the basis of research and writings we conclude that cruelty, of which racial prejudice is a form, affects the self-image of the victims, lowers their impression of themselves, their self-esteem, interferes with their effectiveness, and that segregated schools is an extremely important instrument in having these detrimental effects on human beings. Segregated schools as part of the total pattern of racial segregation.

That was the essence of our testimony at the trial level of the cases which led to the Brown decision. It was also the basis of the brief, the social science brief, which we prepared for the court.

Q. Dr. Clark, could you give us a list of your affiliations with professional organizations and any offices you may have held there? A. Yes. I am a member of the American Psychological Association; I have been a member of their board of directors and in 1970-71 I was president of the American Psychological Association.

I have been a member of it, a division of the [6] American Psychological Association, Division 9, the Society for the Psychological Study of Social Issues, and I think in 1963 I was president of that division, the American Psychological Association, and member of the board of directors.

Q. I believe you gave us a list of your publications, or mentioned your publications.

Could you give us the names of some of your books? A. "Prejudice in Your Child," which was published in 1965—I'm sorry, 1955, and "Dark Ghetto," published in 1965.

I have published books on education. The most recent one is a plan for increasing the effectiveness of education in children in Washington, D.C. schools. I think the title of that was "A Possible Reality."

I edited a number of books. One was with Talcott Parsons, a sociologist at Harvard, I think it was called, "The Negro American," about three or four years ago.

There is a list of the books and articles which I have written.

Mr. Myers: Just for the record, we have a list of articles and books published by Dr. [7] Clark and we would like to tender them as an exhibit of his credentials in this case.

(Five-page document captioned "Kenneth B. Clark: A Bibliography, Additions—July, 1971," was marked Plaintiffs' Exhibit 1 for identification.)

Mr. Myers: I would like to tender Dr. Clark's biography to be identified and marked as Exhibit 2.

(Biography of Dr. Kenneth B. Clark was marked Plaintiffs' Exhibit 2 for identification.)

Mr. Myers: I would like to tender this bibliography, bound, by Dr. Clark. Mark it for identification as Exhibit 3.

(Bibliography by Dr. Kenneth B. Clark was marked Plaintiffs' Exhibit 3 for identification.)

By Mr. Walls:

Q. Dr. Clark, I take it that you have done a considerable amount of study on the effect of discrimination on black children; is that correct? A. Yes, that has been my life work.

Q. Do you consider yourself an expert on the various kinds of factors which may affect the [8] learning process of students, especially black students? A. Well, this is the area of my research and writing, and I—I suppose others would call it an expert, but this is the area in which I have devoted all of my professional and much of my personal attention.

Mr. Walls: On the basis of the foregoing testimony by Dr. Clark, we at this point tender Dr. Clark as an educational and psychological expert.

The Witness: I am a social psychologist.

Q. Dr. Clark, you are familiar with the rule of Drew Municipal Separate School District which basically states that persons of unwed parenthood should not have responsibilities of working directly with students, i.e., teachers, secretaries and other responsible positions, are you not? A. I am familiar with that rule as it has been communicated to me, individuals involved in the case, yes.

Q. In your professional opinion, do you see any educational viability or educational or rational basis for such a rule? [9] A. No. On the basis of my understanding of that rule, I see no positive educational reason or purpose for such a rule.

On the contrary, I see, from my perspective, a very important negative educational function or consequence of such a rule.

For example, as I understand the rule, it applies only to unwed mothers, females. It does not apply to males.

It seems to me that this is a clear discriminatory rule which would necessarily have negative educational value and consequence.

Q. Dr. Clark, briefly let me clear that up. The rule, as stated by the superintendent, Mr. G. F. Petty, of the Drew Municipal Separate School District, states that the rule is applied to both male and female unwed parents. A. That was not my understanding of the rule.

Q. But the facts show that only females have been affected because no males have been discovered at this point. A. Well, it would seem to me that for this rule on this point of sex discrimination not to be discriminatory, it would follow that each time that [10] a female were denied the right to teach or to be in any way involved in the educational process by virtue of being an unwed mother, at that very time and in that particular case the discovery and the finding of the other partner in parenthood, namely, a male, would have to be pursued.

If that were not done, in spite of the theoretical nondiscriminatory aspect of the rule, it would be in effect a discriminatory rule. It would mean that only the female would be punished or excluded or blocked from participating in an important social process while the male, while technically being as, quote, guilty as the female would nonetheless be unpunished.

Q. Do you see— A. By the way, I do think this is an essentially—a punitive rule rather than an educational rule of any educational value.

Q. Do you see any practical reason as to why females are usually affected by this rule and males, let us say, are not affected by this rule? A. I see a number of reasons. Historical, the historical reason is that our society does have a long history of discrimination against females on [11] matters of sex and sexual behavior. These rules and regulations are generally made by males, enforced by males, and they would seem for the most part designed to subordinate females to an essentially inferior role, which the power of our society is mobilized to reinforce.

It is clearly a male dominating approach to human problems and human behavior.

Another reason, of course, is the clear and unquestioned biological fact that the female bears the child, and there is no way in which it is possible for a mother to deny maternity. It is possible for a father to deny paternity, and her society can therefore zero in on the female and enforce punitive roles or punitive techniques on the female.

Q. Does the fact of unwed parenthood have anything to do with the direct ability of a person to teach or to present the proper image of the teacher to a child? A. The fact of unwed parenthood in itself does not, in my opinion, bear directly on the role and function of a teacher.

As I see it, the function of a teacher in the [12] elementary grades is to communicate certain academic skills to children, to help them to become more effective and efficient in basic skills of reading, writing, arithmetic, and to become sufficiently competent in these skills as to be able to think more clearly as the child grows.

So I, for one, do not see where the role of a teacher or the sexual behavior of a teacher in itself bears directly upon the skills.

I do believe that if a teacher is neurotic, if a teacher carries over into her classroom behavior or his classroom behavior certain psychological or behavioral qualities that interfere with the ability of that teacher to function effectively as a teacher, that is another matter.

Where the personal behavior of the teacher, including sexual behavior, does not enter into the classroom and does not interefere with the ability of that teacher to develop the skills of his pupils or her pupils, I just do not see—

Q. What are the basic qualifications of the teacher, with emphasis on elementary and secondary education? A. Well, to me, the essential qualification of [13] the teacher is competence in the ability to develop skills in his or her students.

There is also the important role of a teacher in communicating to the students the importance of these skills. The teacher certainly can't teach something that he or she clearly is not competent in.

For example, a teacher teaching reading ought to clearly demonstrate the ability to read and to communicate also some sort of excitement and enthusiasm about reading.

A teacher who is unable to spell certainly can't communicate to students the importance of competence in spelling, and arithmetic.

I do believe that in addition to these basic academic skills and competences a teacher ought to communicate to students, even from the early grades, the importance of other human characteristics.

I have written and argued that kindness, compassion, sensitivity, respect for other people, are important qualities which educated human beings should have, and while the

home should play the primary role in communicating these qualities to children, they should be reinforced by school and by teachers.

[14] Q. Is there a personality or sensitivity component to a teacher's ability to communicate knowledge? A. I don't think there is any question about it. In fact, my recent papers have all been emphasizing this more and more.

I have argued in my writings and in talks that the ability of a teacher to accept the humanity of the students, to respect the humanity of students and to communicate to the students this positive respect and acceptance, these are, I believe, very important factors in teaching effectiveness.

Q. Is this in any way related to unwed parenthood? A. I do not see that unwed parenthood in itself interferes with either the technical academic competence of teachers or the ability of a teacher to communicate to students the genuine acceptance of the humanity of those students or qualities of kindness, sensitivity and love.

I don't see how unwed parenthood in itself can do that any more than divorce can do it, or separation, or being unmarried.

I, for my own, do not see where any of these [15] factors operating in terms of themselves can or do in any way influence the effectiveness of the teacher.

Q. During the course of this proceeding with which we are involved, several witnesses have testified about the term "role modeling."

Are you familiar with the term? A. Oh, yes. It's a rather common term for social scientists and educators.

Q. Would you please explain that? A. Well, in effect, it means in the most simple terms that in the process of growing up human beings look to other human beings for what are considered desirable characteristics, and sometimes undesirable, and that adults, particularly significant adults in the life of every human being, become a model of what that particular individual will strive toward.

And by the way, in some cases role models can be negative; that is, the individual can be used as a model of what the individual does not want.

Generally the term role model, however, is used in positive terms. It means that the growing individual looks to adults, and sometimes older peers, as the model for their own behavior and attitudes and feelings.

[16] Q. What are the components of role modeling? A. Well, a number of things: speech, style of dress, general personality and attitudes, religion.

Almost every aspect of the individual's being, short of those which are determined by physical genetic determinants, you know, such as height or skin color, anything that the individual learns or is capable of learning, may be influenced by what is called in the shorthand a role model, someone whom he looks up to generally and seeks to imitate.

Q. Do teachers generally affect the moral values of children, and if so, how? A. I think teachers and other adults do affect the values of young people who come in contact with them, yes.

Q. Is unwed parenthood a component or a part of role model? A. If it is so described, yes, it may be. If a particular community or school makes an issue of this, it may very well be a factor influencing the judgment of the child.

Q. It has been testified here by other experts that teachers along with cognitive knowledge also give students or teach students the cultural heritage [17] of the society.

What is your opinion of that statement? A. I think that is a generally true statement, yes, because as you pointed out in your earlier questions, teachers not only

communicate academic knowledge, they communicate an approach toward human beings, a style of life.

In that sense, they contribute to what we call the socialization or the acculturation of the younger generation.

Q. Does unwed parenthood have anything to do with the moral conditions or the status of the said unwed parent? A. No. Again I can give you my opinion. I think it is a mistake, and a mistake that is unfortunately not uncommon in our society, to equate unwed parenthood with morality or a sexual behavior.

My personal judgment is that unwed parenthood for the most part reflects the inability or the lack of knowledge of the—on the part of the female, for the most part, or the male, as to how to avoid unwed parenthood, if it is undesired.

The evidence is very clear that it has nothing to do with morality, it has nothing to do with sexual [18] behavior; it has to do only with the degree of sophistication necessary to control this consequence, this particular consequence of heterosexual behavior.

The comparison or the use of statistics to make judgments about the relative morality of different groups in terms of the percentage of unwed mothers is a very misleading approach to an important issue.

Q. I guess in line with that same statement is the inevitable that a teacher who happens to be an unwed parent will express certain dispositions or moral values to their students or their children simply because that person happens to be an unwed parent. A. Are you asking do I agree with that?

Q. Is that— A. I think absolutely not. As I was just trying to tell you, that I think that the fact of being an unwed mother has nothing to do, as far as I can tell from my readings and study, and in my own judgment, with that person's basic values or morality.

It has to do only with the amount of specific knowledge that that person has about preventing birth or conception, and I do not see that this is in any way related to moral values.

[19] It has also been inferred and testified in this hearing, in this proceeding that you are testifying in today, that unwed parents are unable to teach good moral values. A. I just said to you that I think that that is very spurious, misleading, and by this time it would seem to me that anyone who says this is either deliberately misleading his audience or is ignorant. There is just absolutely no basis for making that statement.

Q. Where are moral values taught? A. Where are they taught?

Q. Where are they taught? A. They are taught many places. They are taught in the home, they are taught in church, they are taught in the community. They are taught in schools. They are taught in the interaction among peers.

They are taught in the media, you know, newspapers, radio, television, moving pictures. There is no one place that individuals are taught, where individuals are taught moral values.

Q. It has come out in this hearing that a great impact of teaching moral values comes from the school, where, on the other hand, it has also been [20] testified that the home plays the greater importance and the greater impact on the teaching of moral values than the schools. A. I do not get into that kind of controvery. If you read "Prejudice and Your Child," or any of my other writings, I do not believe that anyone can say with any degree of certainty or precision or confidence that any one part of society plays any more crucial a role than any other part.

I am, I guess, basically a gestaltist. I believe in the totality of influences impinging upon and influencing human beings, and the whole is important, the schools are important, the larger social atmosphere is important, the media are important.

All of these converge on an individual and influence individuals in terms of their relationship to all other influences.

Q. From your experience and in your professional judgment, do you have knowledge whether children generally and typically find out about the private and/or sex lives of their teachers? A. I think that carries only in a situation in which it is deliberately imposed. I ordinarily—it would seem to me in a healthy situation children [21] are not generally involved or have direct or specific knowledge of the sex lives of their parents, much less their teachers.

When an effort is made to intrude this type of knowledge or information, then it becomes a factor. But ordinarily this does not happen.

Q. In your opinion, how could a teacher express to a student his private sex life? A. As I see it, only by direct communication or by being the victim of gossip or rumor, or something of that sort.

I really don't understand that line of questioning, except that, you know—

For example, in my own operation here at the Metropolitan Applied Research Center, I have no knowledge of the sex life, the personal sex life, of members of my staff. I have no knowledge of the sex life of my students at the college. That is not my affair.

Q. The basis for that question is that some experts in this hearing have testified that the only way that a teacher could influence the sexual behavior of a student is to, say, proselytise that sexual behavior in the presence

of the student, that is, [22] possibly have sexual relations in the class, where, on the other hand, it has been testified that students infer from just the status of the teacher what that sexual behavior is, i.e., unwed parenthood. A. I don't know that I am the best person to discuss it. I just happen to believe that the personal lives and the sex lives of individuals are, these are personal matters, and I believe are protected by the rights of privacy and protected by moral concerns.

I think that it is immoral for individuals to pry into the personal or sex life of other individuals.

I believe that it is questionable morality for individuals to impose their personal sexual patterns or gratifications upon others where that is not a particular concern.

So I—I'm afraid that I'm not being able to deal with your question because my whole perspective on this matter is that it is an area of privacy. I don't want anybody interfering with my sex life or asking questions about it, unless it is directly related to my relationship with them, any more than I want them asking about my methods of dealing with my urinary and defecatory functions.

[23] Q. Do you know of any contrary opinion or—

A. I don't understand you.

Q. —contrary opinion as to what you just stated?

A. I think that the whole—what I consider obscene preoccupation with censorship and invasion of human privacy seem to me to be contrary to this opinion.

Q. Dr. Clark, do you know of any educational studies or reports or treatises, or whatever, that show that unwed parenthood has a detrimental effect on students? A. No, I don't know of any such studies.

I also don't know of any studies which show that a teacher having an abortion has any detrimental effect on students, or I don't know of any studies which show that teachers who are divorced have any detrimental effect on students, or teachers who are separated.

To really take it one step further, I don't know that there are any studies which demonstrate that homosexual teachers have any detrimental effect on students short of an attempt on the part of a homosexual or a heterosexual teacher to proselyte or to [24] seduce a student.

There I draw the line. I don't think that it is the role—I think it is an abuse of role and authority of any teacher to attempt to exploit a student sexually or any other way. I think that it is an abuse of a role for a teacher to attempt to exploit a student economically or maybe even in more subtle human ways.

Q. Just one question about something that has come up in this hearing before.

Does the use, in your opinion, of contraceptive devices or the use of abortion to prevent birth express any morality about the person using such contraceptive? A. I am afraid that I am repeating myself. I said, and I will repeat now, that it is my personal opinion, it is my philosophy and it is my opinion as a psychologist that the whole realm of sexual behavior of an individual is to be excluded from judgments of that individual's professional area of competence.

I can't say that any more strongly. I think that the right of the individual to this area of privacy should be inviolate and inviolable.

Q. Just briefly, would the mere fact that a [25] teacher is an unwed parent in your opinion be an influential factor in schoolgirl pregnancies?

It has been testified that that is the reason that this rule—one of the reasons this rule was implemented, and the— A. I am sorry, I just can't take that seriously. I think that young girls become pregnant through sexual behavior. They don't become pregnant in a classroom.

I'm not being facetious. I really think that that is an absurd statement and an absurd question.

Q. You earlier testified that if unwed parenthood were made a controversy in a community then it would possibly affect students. A. Sure. Anything that becomes a controversy, if you raise the issue of the height of a teacher as to whether this affects the competence of the teacher, certainly you will create a situation in which not only students but everyone else would start looking at teachers in terms of their height.

That affects, sure. If you say that a teacher is a witch and you get people talking about this, is this person a witch or is this person not a witch, and stir up discussion and pros and cons on this, [26] without question that's going to influence the ability of that teacher to deal with her responsibilities in that classroom, because it would have influenced the amount of attention that the students will or will not have paid to what is being said, what is being said in the classroom rather than what is being said outside of the classroom.

Q. In a community where you have a large number of black children, say, eighty per cent black children in the school district, and you also have a large percentage of children born in that area being born to unwed parents, do you see any detrimental effect that a rule like this could have on, say, black children? A. Well, I think that this rule, my interpretation of this rule in the light of everything that I have told you about my personal philosophy, is that the purpose—the only purpose that I can see for such a rule is a punitive one, that it is a rule that comes out of a history of Puritanistic punitiveness, it comes out of an intentional or unintentional discriminatory punitiveness directed toward females.

It is a dehumanizing rule in that it imposes upon human beings a stigma which to me is absolutely [27] unnecessary, except in terms of cruelty.

It imposes a stigma, an unnecessary stigma, upon the children who are the products of, quotes, the unwed situation of the mother, and it imposes a discriminatory cruelty upon the mother.

I see no other function for such a rule. It certainly has no intrinsic educational function. It has no social function. It has, as far as I can see, only a dehumanizing and stigmatizing function.

Mr. Walls: That is all I have.

Mr. Myers: Dr. Clark, do you have any affiliation with the New York system of higher education?

The Witness: Well, I am a member of the Board of Regents of the State of New York, and this is the governing body for all education in the State of New York, elementary, secondary and higher.

By Mr. Walls:

Q. Dr. Clark, have you ever heard of the use of this rule in any other place, or have you heard of the use of this rule before? A. No, I haven't. I have not ever before heard of this rule being explicit.

[28] I have heard of discussions on homosexuality as a factor that could be used to exclude teachers, but I have heard that more in discussion rather than a flat rule to the effect that a homosexual teacher should not be a teacher.

Q. Would the Board of Regents have authority to make such a rule in the State of New York? A. I think in terms of the Constitution of the State of New York and in terms of the statutes, the education laws, that the Board of Regents would have such an authority.

I personally doubt that it would exercise any such authority.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

(Title Omitted in Printing)

DEPOSITION OF EDMUND GORDON FOR PLAINTIFF, a witness, taken pursuant to notice, held at 125 West 120th Street, New York, New York, on May 29, 1973, at 2:30 o'clock p.m., before a Commissioner of Deeds of the City of New York.

* * *

[3] EDMUND GORDON, having been first duly sworn by a Commissioner of Deeds of the City of New York, testified as follows:

Examination by Mr. Myers:

Q. Prior to beginning, Dr. Gordon, I would just like to say there are some things this afternoon that I am going to ask you that possibly sound ridiculous and repetitious. Nevertheless, to the best of your ability, I would like for you to try and be as responsive to my questions as possible.

I know that some of the things you will hear time and time again but in order for us to make a record and to refute some of the things that have been submitted and tendered in this cause of action we have to do this.

Now, for our record again, I would like for you to please state your name. A. I am Edmund Wyatt Gordon.

Q. Mr. Gordon, where do you currently reside? A. Pomona, New York.

Q. How long have you resided there? A. For 19 years.

[4] Q. Are you employed now? A. Yes, I am.

Q. Dr. Gordon, where are you employed? A. I'm employed at Columbia University. It's Teacher's College which is its Graduate School of Education.

Q. Would you tell me in what capacity are you so employed at Columbia University? A. I carry several titles here. My principal title is that of Professor of Education. I also serve as Chairman of the Department of Human Development and Guidance.

Q. What degree do you hold? A. I hold four degrees. A Bachelor of Science, a Bachelor of Divinity, a Master of Art and a Doctorate Education.

Q. Dr. Gordon, where did you receive your Doctorate of Education? A. At Columbia University.

Q. Dr. Gordon, how long have you been specializing in the field of education? A. I combine psychology and education. I have been in Higher Education off and on since 1945 when I first worked at Howard University. I left Education to go into Clinical and Counseling Psychology from 1950 to about [5] 1958 when I returned to Higher Education, and have been in Higher Education from 1958 to the present.

Q. Thank you.

Now, Dr. Gordon, have you had an occasion to publish any articles in any major professional magazines during your career? A. Yes. I have published about 60 articles in technical and professional journals.

Q. Would you be so kind, Dr. Gordon, as to give us some of the better-known or more eminent articles that you published in the area of Education, especially Public Education. A. In the Journal of Orthopsychiatry I have published three articles dealing with the education of poor children, generally called Compensatory Education.

I have edited two issues of the Review of Educational Research, which is the Journal of the American Research Association, both of these dealing with problems of Education in Elementary and Secondary Schools.

I have published in the Journal of Comparative and Physiological Psychology articles dealing with child development.

I have published in a magazine that is published or was published by the Children's Bureau called [6] Children.

I have published in the—

Q. Just for the record, doctor, I think that's sufficient because I have a document which I would like to identify for the record which is basically a list of publications and scholarly notes that Dr. Gordon has written and also a list of books.

Sir, have you had occasion to write any major book or any book in any areas? A. My major book is entitled Compensatory Education, Preschool Through College.

Q. When was that published, doctor? A. That was published in 1966 by the College Entrance Examination Board.

Q. Fine.

Dr. Gordon, would you be so kind as to, as succinctly as possible, list the professional or better-known organizations that you are a member of. A. Well, I'll start with those in which I am a Fellow.

I'm a Fellow of the American Association for the Advancement of Science. I'm a Fellow of the American Psychological Association. I'm a Fellow of the American Orthopsychiatric Association. I'm a member of the American Personnel and Guidance Association, the [7] American Educational Research Association.

Those are the principal organizations.

Q. Thank you.

I believe moments ago, sir, when you were listing your degrees, that you stated that you had had some involvement with the clergy.

I believe, a Bachelor of Divinity? A. A Bachelor of Divinity, yes.

Q. Are you a member of the clergy? A. Yes. I received my Bachelor of Divinity in '45 and was ordained in '45 as a Presbyterian Minister.

Q. Thank you.

Dr. Gordon, on your list of scholarly works I believe it has been noted that you have been involved in several or quite a few, I understand, national studies.

Would you explain for the record and to Judge Keady the nature of these studies and what you were involved with in doing these studies? A. Yes. I was commissioned by the College Entrance Examination Board to do a national study on programs on education for poor children back in the early 60's. That was also in the book that I referred to earlier, Compensatory Education.

[8] I was commissioned by the Ford Foundation to do a study of Higher Education, a report which has just been submitted and which will be published in the fall as a book.

I was commissioned by the U. S. Office of Education to do a study of exemplary programs in Elementary and Secondary Education, a report which was completed last year, which is now being edited and a book to be published next spring.

In addition to that specific study I served for two years as the National Research Director for Project Head Start which took me into most of the states and most of the school districts in those states, those that had preschool, kindergarten and Head Start programs, doing research of them.

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[9] A. I am familiar with it as it has been reported to me.

Q. For the record, the rule essentially states that an unwed mother or, for that matter, an unwed father should not and cannot be allowed to teach in the classroom.

It has been stated by the Superintendent for the Drew Municipal School District that unwed mothers would not be employed because of a detrimental effect that it would have or will have on the development of children in Secondary Education or on a Secondary Education level and also elementary level.

I would like to receive from you a response based upon your professional ability to give a response [10] as to what is your opinion of this particular rule in terms of its validity or non-validity, in terms of its rationality or irrationality. A. I would say, Attorney, that while I can partially understand what the people who are advancing this rule may have in mind I must say that it is both ineffective and ludicrous.

It's my judgment that the marital status of parents has no relationship to effectiveness as a teacher or employee of a school system or any other institution, for that matter. The fact that a parent has not been legally married in our society seems to me to be an irrelevant consideration particularly since it's impossible to make judgments with respect to the cruciality of such a condition. Maybe I'll explain what I mean by that.

Q. Yes, go right ahead, doctor. A. I suspect that people who advance such a position use marital status of parents as an index to the character, the morality and the values held by persons.

The circumstances under which persons become pregnant and bear children or become the conceivers of children are such that it is difficult to make judgments about morality and character based upon those circumstances [11] or even the—and certainly not the—simple fact that pregnancy has occurred.

It might be argued that the difference between pregnancy or absence of it in some instances may be more a function of income level or culture or a variety of other

circumstances than the character of the values held by the person who has become pregnant or who contributed to it and I'm assuming that we are dealing with both.

In this rule I think it may be far easier for us to focus on the female than on the male since the contribution of the male is much more difficult to identify and make obvious.

Q. Fine.

Doctor, an expert for the State of Mississippi and the Drew Municipal School District got into the question of role modeling in the classroom.

Now, it was his contention that a teacher is a role model and that a role model should maintain certain levels of prestige in order to be sent out as an example, and it was also his contention that an unwed mother was not a role model and consequently she was a bad image and constituted a detriment to children, in the educational process.

[12] Could you tender a response to that? A. Yes. Fortunately, role modeling is not a generic phenomenon. I am not a universal role model. Role modeling is quite specific and there are very, very few situations that I can conceive of where teachers' marital status, parental status or sexual behavior constitutes a target behavior that they are modeling in school.

The aspects of their behavior that youngsters are much more likely to be influenced by have to do with the relationships between the youngster and the teacher, the way in which the youngster feels about this person's treatment of him or her, the extent to which the youngster sees himself or herself respected by the person.

Now, if one is arguing that the unwed parent is modeling unwed parenthood, one shall also have to establish the fact that this was, number one, known; number two, that the youngster or youngsters involved were using the

teacher as a role model for parenthood or marriage or any one of those attributes.

The fact is that it would appear from the little bit of research we have on this subject that as far as parental behavior, parental attitudes, parental models, are concerned, these are much more peculiar to [13] the significance of adults in the homes in which youngsters grow up.

When it comes to learning behaviors and some public social behaviors—and by that I mean the way in which people relate to each other, treat each other—these are more likely to be modeled and developed in the community, and the school, of course, would be, of course, a part of the community, so that the assumptions that the parental status of the school employee now is important because of its impact as a model for a youngster, I think that this is a misinterpretation of the function of role modeling.

Q. To illustrate, on a point that you discussed moments ago, and I'm going to ask you this very directly, do you feel that unwed parenthood has any direct relationship on a child's ability to learn? A. I do not feel that it does, so the answer would be no. I know of no evidence that would even suggest that it does. There are—it's hard to even conceive of a circumstance in which that relationship would be deleterious to learning.

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[14] Head Start Director; am I not correct? A. Correct. Let me correct that. It's the Director of Research for Head Start.

Q. I'm sorry. Thank you.

Now, in your travels and through your experience—how many states, by the way, did you go to? A. I think I've been in about 40 of the 50 states.

Q. Now, in your extensive and exhaustive experiences, have you ever come into contact with a rule like this before? A. I have certainly not come across that particular rule anywhere, and hastily reviewing, I can't conceive of any school district I have been in where that kind of standard was established for employment in public schools.

Q. To the best of your personal knowledge as a professor here and one who is obviously very familiar with New York City, I'm sure—the public school system—do you know whether or not the State of New York or the City of New York has such a rule? A. No, I don't know of such a rule in New York State and, given the position that the School Board has taken on a number of issues, and the Commissioner has taken on [15] a number of others, and the Board of Regents on still others, I would venture to say that such a rule could not exist in New York State.

Q. Would you care, sir, to tender some response why you believe that the New York State school system would not contrive such a rule? A. I think probably, number one, being a state that has a relatively high level of organized labor within its school ystem, the rather reactionary character of the law and its discriminatory character would make it unacceptable to the organizations that represent teachers.

Number two, I think that school officials probably would, as a rule, feel that would be difficult if not impossible to enforce, certainly to enforce with any equity.

Thirdly, not since the early part of this century have school districts in the more enlightened areas sought to monitor and control the personal and private behavior of teachers.

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[16] The attention has been more sharply focused on more technical qualifications, on competence, on those aspects of teacher and staff behaviors that can be demonstrated to have a more direct effect upon the development of children.

Q. Now, Dr. Gordon, there's one undercurrent thesis on the part of the Superintendent of the Drew Municipal School District, and now, obviously, the Board of Education, and that is that there is some correlation between pregnancy of school-age girls and having an unwed mother in the classroom.

To be more particular, it was asserted that there had been a rise of pregnancies in this particular school district and the Superintendent of Education argued to correlate the rise of pregnancies with the presence of unwed mothers in the classrooms.

Would you care to give me a response on that? A. Yes. Unfortunately, there's a long tradition of error in moving from correlation between things to assumed causation and the fact that these two figures may correlate, of course, has nothing to do with a causal relationship between them. I suspect that if one looks [16A] at the other demographic and etiological characteristics of that community you may find correlations with a number of other variables there.

[17] My own judgment is that people do not elect to become pregnant out of wedlock. Perhaps I should modify that to say that I suspect that most people who become pregnant out of wedlock do not elect to do so. I suspect that they do so because they have taken a position on the rightness or wrongness of it. My colleague here at the University in the Department of Health Education, Professor Mal Fetti, argues that it isn't information about sex that gets young people into trouble with respect to their sexual behavior, it's the feelings, the sexuality

itself, and what we have in persons who become pregnant out of wedlock isn't a breakdown of morality and ethics or character, it is more likely related to circumstances in their life that do not enable them to adequately deal with sexuality and the models that are available to them, I think, are unimportant there.

Q. Now, the general consensus, ostensibly, of the Drew Municipal School Board in regards to the undercurrent of the issue, has to do with morality, and it seems though that the proposition is that an unwed parent—unwed mother or an unwed father—is an immoral person.

I would like to get your response for [18] the record, doctor, to that proposition that unwed parenthood is either synonymous with immorality or is immorality incarnate.
A. Well, this is a very difficult issue to deal with, and one of the reasons why it certainly should not be established as a rule.

It's interesting that in the current period that if you live in a state that has had very high resistance, say, to permissive legislation with respect to abortion, the discontinuance of a pregnancy is an immoral act for these people.

One would wonder how one distinguishes with respect to the degree of immorality when one has a conflict between one person who is pregnant out of wedlock and the other person who is pregnant, chooses not to become a parent, but aborts the child instead.

Now, the paradox of contradiction represented here, I think, points to the fact that the issue is really drawn at the wrong point.

Morality does not adhere to parenthood. I think morality, if it adheres to any part of the process, adheres to the act of conception.

Now, if we go back to the act of conception we really are talking about sexual intercourse, and here, [19] in

our society we have, at least publicly, taken the position that sexual intercourse out of wedlock is not only illegal but some people would argue immoral.

But it doesn't sound as if your school district now is setting up sexuality, fornication, as its task, which is the implied basis for the morality. What they are saying is that if you are stupid enough or honest enough or religious enough to bear a child, having conceived it, then you are immoral.

And it seems to me that that is an intolerable position for the Board to take.

Number two, if we go back and talk about now the way in which one manages one's sex life as being the basis for judging morality or immorality and if we begin to look at the statistics with respect to out of wedlock intercourse, it would appear that in our society, that the presence or absence of such behavior is an incorrect basis for judging morality, since better than 50 percent of our population is thought—by the most recent studies of sexual behavior in males and females—to participate in intercourse outside of wedlock.

Now, when a behavior becomes the norm for a [20] society it seems not only to be ridiculous but I would think poor law to try to declare such behavior as illegal, since our laws are supposed to represent the mores of our society.

So what I'm saying is, that it appears from the statistics available that intercourse between consenting adults is an accepted fact in our society, so that it is no longer appropriate to call that an immoral act.

The School Board's position seems to be suggesting by implication that sexual activity out of wedlock is immoral. They are taking as their evidence the fact that pregnancy—which I think is discriminatory—is the basis for the immorality, for the sexual behavior of the persons.

They can either modify the sexual behavior—even if they ever could they might find that the rule is inconsistent with the behavior of most of the people in the society. These considerations lead me to conclude that the rule, of course, is inappropriate and, of course, unenforceable, with any kind of equity.

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[24] However, we have no evidence that the nature of the school experience makes any difference with respect to the moral development of youngsters.

The few studies that have investigated this issue find that in the absence of specific concrete work on value concepts, moral concepts, that schooling and the kind of schooling one has, that is, whether one is in a religious school or a nonreligious school, whether one is in a school which gives some attention to civics and social studies, seems to make little difference in the overall behavior of youngsters.

Where youngsters are deliberately taught, though, certain social studies in the school experience, they do tend to state those attitudes more frequently than those youngsters who are not so deliberately taught.

[25] So, again, the research on the subject would seem to suggest that the most pertinent influence on moral and academic development is the home; that schools can have an influence on the development of specific academic skills, and that they tend to have relatively little impact on the so-called moral development of youngsters.

Q. Dr. Gordon, is it inevitable that a teacher who happens to be an unwed parent will express certain dispositions of moral values to their students simply because that teacher just happens to be an unwed parent? A. No. And if I may refer back to some of my previous testimony, since there are so many factors that enter into

both parenthood and the conditions and circumstance of parenthood, this is not a homogenous group we are talking about.

Clearly, there may be a person in the world who is married or unmarried or whose general circumstances of life may be such as to influence what one says or does or teaches or does not teach to a particular group of children.

But the fact is that factors associated with married status of parents are so complex that one [26] cannot make this kind of generalization, nor is there evidence to support the assumption that there would be a greater likelihood of such parent creating a negative influence than, say, people who have prevented pregnancy by contraceptive devices or people who have abstained from sexual expression entirely.

In fact, I think if I had my choice I would probably shy away from the person who had completely abstained from sexual behavior, because, again, in our society that is so atypical a pattern of behavior as to suggest some possible personal problem—less so, I would say, than a person who happens to have become pregnant possibly by accident out of expression of a normal aspect of behavior.

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[27] I think the chances are that in a relatively small community the personal lives of members of the community are likely to be public knowledge. However, what youngsters do with that knowledge depends upon the mores, the norms, established in that community, and the role that the person whose behavior they have focused on plays in their life.

If one has chosen a particular person as one's model for parenthood or for sexual behavior or for social behavior, then, conceivably, that aspect of his or her behavior may

become important. But if one has chosen this particular person as one's model for a number of other behaviors, it may be quite irrelevant.

In some circumstances it may even be that if—well, if we take the community you are talking about where I suspect if there is a large number of low income people and a large number of black persons, I suspect that the incidence of out of wedlock [28] children may be relatively high. Under such circumstances, this knowledge on the part of youngsters about a teacher would seem to me to have no relative effect; conceivably could have some positive effect in that it may make the person more a part of the style, culture, mores of that community.

The latter statement may be a bit of an extended remark, but certainly I would find no negative influence angle.

Q. I'm glad that you mention that, Dr. Gordon, because in the Drew Municipal School District, and in the high school, in particular, I believe that 80 percent are black.

There are figures to show that out of an approximate 710 children born—let me give you the exact figures—I believe out of 709 total births in Sunflower County—and this is where the school is—that it has been shown that 316 of those births were born out of wedlock and that approximately—this is of non-white people I'm talking—approximately 316 were born out of wedlock and have a percentage total of 44.6 percent—the children born—non-white children born—in this particular county, were born out of wedlock.

[29] Would you make a comment in terms of that, because that seems—it is a race issue—and I would like you to get into that. A. Well, there are two points that ought to be made from those figures.

One has to do with the fact that when the proportion of persons showing any behavior approaches fifty percent of a population it is difficult to avoid the conclusion that a social norm has been established, and social norms are generally thought not to have deleterious effects upon the development of other people, all the people who live in that society, in that culture.

However, the second point which is also terribly important—and one that we tend to neglect—is that there are various concepts of wedlock. There is, of course, the legal one when one has a formal marriage, a license, and where certain legal rights adhere to both childhood and parenthood. Child of the parent. But there are also informal relationships. And we do know that there are a number of cultures inside the United States and outside of it where formal marriage is not so much the pattern but any variety of liaisons exist.

[30] Now, when you take figures like this it must be clear that there are concepts of wedlock and maybe we ought to know the extended figure where they are operative that do not fall within the bounds of the legal concept of marriage, of legitimacy, if you want to call it that.

However, we do know that there has been a long history in the development of man, history of man, of effort at imposing one set of values or morals or behaviors on another group. And it would appear from the figures that you give on the black group, and which I suspect are probably three or four times higher than similar figures for whites, it is clear that you are dealing with a different culture here.

And to try to impose the same standard on both cultures, now, I think, is not only incorrect but discriminatory.

Third, part of the phenomenon we are dealing with has less to do with ethnicity than it has to do with economic status. Certainly Kinsey data, Masters and Johnson data, most of the data coming out of sex research, show that the attitudes towards sexuality, sexual expression and childbearing differ across [31] economic groups, with our lower economic groups—with no regard for ethnicity—our lower economic groups being less formal about the family basis for child rearing than are our more affluent groups.

So we have a kind of three-way discrimination here. We have one that does not give adequate regard to the differences in culture, one that does not give adequate regard to the higher incidences of certain behaviors and certain groups, and we have the fact of not giving adequate recognition to developmental patterns of behavior across economic groups.

Given these kind of figures it would seem to me that this kind of reasoning is discriminatory with respect to Blacks, with respect to low income people, and we haven't discussed, of course, in any detail, its discriminatory impact on women.

* * *

[32] Could that or could that not be interpreted as saying that perhaps Black teachers could have or would have a different standard of teaching or that of development? A. No, I don't think we should make that conclusion. Actually, we are dealing with two issues here. One of them has to do with the impact of teachers, of school staff characteristics—that is, the social behavioral characteristics—on the development of children.

The other has to do with the validity, the equity, of a particular law.

Now, I think my testimony indicates that in my judgment and on the basis of the little bit of tangential research on this subject, we have no reason to conclude that the social behavior or alleged parental status of teachers and school staff have any effect on the academic or the moral development of children.

[33] In addition, I am suggesting that the rule, since it has no validity, in its assumed impact on the development of youngsters, the rule also is discriminatory, and it is discriminatory because it singles out particular groups and particular behaviors and treats them in a generic fashion when one should be looking at them relatively.

In this particular instance I am suggesting that in a society where a particular pattern of behavior is the norm, to rule that pattern of behavior out as illegal, unacceptable, discriminates against the cultural group that practices that behavior.

Q. Now, one last question, and I would be derelict, remiss and negligent if I didn't take the opportunity to question you from a minister's perspective, since we are fortunate enough to have you as a dual expert.

You have also testified that you for a number of years have been actively involved in the Presbyterian Church, and you are an ordained minister. A. Correct.

Q. Could you give me a clergyman's perspective [34] on this particular rule and particularly in terms of the morality of it, and how you would look at it. A. Well, as a professor and a psychologist and a minister I am convinced that judgments about people have to be made individually. I don't believe in making judgments about groups of people, classes of people, categories of people.

If I were in the responsible position here, I think I would want to look at the circumstances involved in each of the individuals about whom I had to make judgments about any aspect of their qualifications.

So that my first response is to make this plea for looking at individuals in the context of their circumstances and making definitive judgments about them.

On the broader issue though, I think, as a minister, I would have to take the position that the fact of parenthood ought to be judged on the basis of the manner in which that parenthood is demonstrated, is executed.

If I'm dealing with a person who is a responsible parent, I think that that is more important than the issue of the circumstance under which parenthood [35] developed.

So that if I were counseling my flock I would be—I would disregard the source of parenthood and would place my emphasis on the manner in which parenthood is discharged.

• • •

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,

Petitioners,

v.

KATIE MAE ANDREWS, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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QUESTION PRESENTED

WHETHER A SCHOOL DISTRICT RULE WHICH EXCLUDES FROM EMPLOYMENT, PARENTS OF OUT-OF-WEDLOCK CHILDREN VIOLATES THE FOURTEENTH AMENDMENT IN THAT IT LACKS A RATIONAL RELATIONSHIP TO ANY LEGITIMATE INTEREST OF THE SCHOOL BOARD.*

COUNTERSTATEMENT OF THE CASE

Respondents are four black women who were denied or terminated from positions as teachers or teachers' aides in the Drew Municipal Separate School District solely on the basis of a rule

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* Were the Court to grant certiorari herein, Respondents would raise further questions under the First, Ninth, and Fourteenth Amendments in support of the judgment below: 1) whether the rule violates plaintiffs' liberty and privacy; 2) whether the rule, which can only be effectively enforced against women, constitutes unlawful discrimination on the basis of sex; 3) whether the rule, by virtue of its disparate impact on blacks, constitutes unlawful discrimination on the basis of race; 4) whether the rule invidiously singles out unwed mothers; and 5) whether the purported objective of the rule is constitutionally permissible.

invented by Petitioner, Superintendent Pettey, precluding employment of parents of out-of-wedlock children. The only victims of the rule challenged it under 42 U.S.C. §1981, 1983 et seq., Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq., and the Fifth and Fourteenth Amendments to the Constitution.

Extensive evidentiary hearings on the origin, scope, purpose and impact of the rule were held by the District Court. Petitioners' statement of the case is an attempt to reargue before this Court the findings made by the District Court and adopted by the Fifth Circuit, to wit:

1. "There is no doubt that the policy is solely attributable to Pettey, there was no evidence that he sought either the prior advice or consent of the Board." (A5)

2) The rule was motivated by Pettey's conviction that the bearing of an out-of-wedlock child is "prima facie evidence of a lack of morality" and that "the circumstances under which an illegitimate birth occurred is (conclusively not) at all relevant to the issue of good character or bad character." (A9, fn. 7)

3) "[T]he superintendent's fiat, altogether unsupported by sociological data, equates the single fact of illegitimate birth with irredeemable moral disease." (A11, A30)

4) The rule was intended to apply not only to instructional personnel, but to secretaries, librarians, cafeteria operators, nurses, social workers, school principals, school volunteers and even P.T.A. presidents. Pettey was

uncertain whether the rule should include bus-drivers, janitors or maids. (A5, fn. 2)

5) There was no evidence beyond "defendants' suggestions, quite implausible in our view" that a person's status as an unwed parent would be known, deemed praiseworthy and emulated by the students, (A13,33); and there was no evidence, "other than speculation and assertions of opinion," that "the presence of unwed parents in a scholastic environment contributes to school girl pregnancies." (A13)

In sum, the unanimous findings of the lower courts based upon the testimony of Respondent Pettey, belie Petitioners' contention that the rule is not premised on a conclusion about the moral character of a parent of an out-of-wed-

lock child. Moreover, it is clear that, after careful consideration of the testimony and credibility of defense experts who attempt to establish the after-the-fact rationale for the rule set forth in paragraph 5 above, the District Court rejected their testimony as being "of a judgmental nature unsupported by any studies that provide a sound, factual basis for their conclusions." (A24) The Circuit shared the District Court's view that the testimony concerning role-modeling by Petitioners' so-called expert, Dr. Ernest van den Haag, upon whom Petitioners rely so heavily herein, (Pet. pp. 5-7) was "speculative," if not "quite implausible." (A13, 33)

These findings irrevocably led the lower courts to the conclusion that the rule "created an irrational classification." (A 7, 25).

REASONS FOR NOT GRANTING THE WRIT

I.

THE LOWER COURTS' TESTING OF THE RULE AGAINST FOURTEENTH AMENDMENT STANDARDS IS CONSISTENT WITH THE SETTLED PRECEDENTS OF THIS COURT.

Petitioners' first claim that "the district court lacked jurisdiction to consider these claims for employment" (Petition, p. 8), is patently absurd. It ignores and distorts the settled precedent of this Court which holds that a person may not be excluded by the state from a profession or occupation in a manner or for reasons that contravene due process or equal protection.

There is no conflict, as Petitioner contends, between the decisions below and this Court's rulings in Board of Regents v. Roth, 408 U.S. 564, and Perry

v. Sinderman, 408 U.S. 593.The threshold question in every case is "whether the (nature of) the interest (at stake) is within the Fourteenth Amendment's protection of liberty and property," not whether the interest can be characterized as a "right" as opposed to a "privilege." Board of Regents v. Roth, supra, 408 U.S. at 571. This Court reaffirmed in Roth that Fourteenth Amendment liberty is at stake at a minimum "where a person's good name, reputation, honor or integrity" is at stake. Wisconsin v. Constantineau, 400 U.S. 433, 437; Wieman v. Updegraff, 344 U.S. 183, 191; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123; United States v. Lovett, 328 U.S. 303, 316-317; Peters v. Hobby, 349 U.S. 331, 352 (Douglas, J. concurring); where the state's refusal of em-

ployment "impose[s] . . . a stigma or other disability that foreclose[s] . . . freedom to take advantage of other employment opportunities", see Joint Anti-Fascist Refugee Committee v. McGrath, supra, 341 U.S. at 185 (Jackson, J., concurring); Truax v. Raich, 239 U.S. 33, 41; and where eligibility regulations fail "to have a rational connection with the applicant's fitness or capacity. . ." Schware v. Board of Bar Examiners, 353 U.S. 232, 239; Slochower v. Board of Higher Education of New York, 350 U.S. 551, 555. See also, Willner v. Committee on Character, 373 U.S. 96, 103; Cafeteria Workers v. McElroy, 367 U.S. 886 at 894, 898; Board of Regents v. Roth, supra, 408 U.S. at 573-574.

Respondents were denied teaching positions on the basis of their being

identified as mothers of children born out-of-wedlock and, thereby, branded as immoral and as a baneful influence on the children they would teach. See Perry v. Grenada Municipal Separate School District, 300 F. Supp. 748 (N.D. Miss. 1969). Clearly, the concept of liberty, as enunciated in Board of Regents v. Roth, supra, and the cases cited therein, encompasses their complaint.*

Furthermore, both courts below implicitly recognized that the rule impinges upon rights of fundamental constitutional dimension: the right to procreate and the right to rear one's na-

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* Even where liberty or property interests subsumed by the Due Process clause, as explicated in Roth and Perry, are not at stake, the principle of Equal Protection invalidates a classification which has no rational relationship to a legitimate legislative objective. United States Department of Agriculture v. Moreno, 413 U.S. 528; Jefferson v. Hackney, 406 U.S. 535; Weber v. Aetna Casualty & Surety, 406 U.S. 164. As this is the test applied by the lower courts, see discussion infra, p.13, Petitioner's Due Process argument is irrelevant.

tural children. (A10, 30)* As such, the rule demands scrutiny under the Due Process and Equal Protection Clause of the Fourteenth Amendment consistent with the settled precedent of this Court. See, e.g., Cleveland Board of Education v. La Fleur, 414 U.S. 632, 94 S.Ct. 791; Roe v. Wade, 410 U.S. 113; Stanley v. Illinois, 405 U.S. 645; Eisenstadt v. Baird, 405 U.S. 438; Griswold v. Connecticut, 381 U.S. 479; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535; Meyer v.

* Quoting the District Court (A30), the Fifth Circuit held: "A past biological event like childbirth out of wedlock, even if relevant to the issue, may not be controlling; and that it may be considered more conventional or circumspect for the infant to be surrendered to others for upbringing rather than be reared by the natural mother is hardly determinative of the matter. Furthermore, the policy, if based on moral judgment, has inherent, if unintended, defects or shortcomings. While obviously aimed at discouraging premarital [sic] sex relations, the policy's effect is apt to encourage abortion, which itself is staunchly opposed by some on ethical and moral grounds."

Nebraska, 262 U.S. 390.* See also, Keyishian v. Board of Regents, 385 U.S. 589, 603, 605-606.

Though it was not necessary for the lower courts, and it is likewise not necessary for this Court, to treat the liberty at stake herein as "fundamental," it is clear that the rule demands and was properly accorded scrutiny under the Fourteenth Amendment.

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* Petitioners' argument that these rights abide only in the context of a state-sanctioned marriage relationship is without support in this Court's rulings. In Stanley v. Illinois, 405 U.S. 645, the Court made explicit that the rights to conceive and nurture one's children, articulated in Meyer v. Nebraska, supra, and Skinner v. Oklahoma, supra, exist independent of the marital relationship. Stanley v. Illinois, supra, 405 U.S. at 651. See also, Roe v. Wade, supra, 410 U.S. at 124, 148; Eisenstadt v. Baird, supra, 405 U.S. at 453; and Griswold v. Connecticut, supra, 381 U.S. at 497 (Goldberg, J., concurring).

II.

SINCE THE PETITION SEEKS REVIEW OF THE DISTRICT COURT'S FINDING OF FACT, CONFIRMED BY THE CIRCUIT, THAT THE RULE LACKS ANY RATIONAL RELATIONSHIP TO ITS ASSERTED OBJECTIVE, CERTIORARI IS NOT WARRANTED.

Point II of the Petition effectively seeks certiorari in order to have this Court review the basic findings of fact made by the District Court and confirmed by the Fifth Circuit, which findings underlie their conclusion that the school board's rule barring mothers of out-of-wedlock children from employment, in other than maintenance, jobs lacks any rational relationship to any legitimate state objective. (See Counter-statement of Facts, supra pp. 2-4). This Court has made clear that such factual review is not a matter meriting issuance of the writ of certiorari.

Berenyi v. Immigration Director, 385 U.S. 630, 635; Graver Mfg. Co. v. Linda Co., 336 U.S. 271, 275; United States v. Johnston, 268 U.S. 220, 227.

Though Petitioners' argument is couched in the plaint that the lower courts failed to apply the presumption of constitutionality (Pet. pp. 11-13), Petitioners ultimately concede that the question presented is whether the "rule in question serves a legitimate state interest and has a rational relationship to such interest." (Pet. p. 13). There is no question but that the lower courts applied this "traditional" rational relationship test of Equal Protection. United States Department of Agriculture v. Moreno, supra; Jefferson v. Hackney, supra; Weber v. Aetna Casualty & Surety, supra.(A7-8, 25-27)*

* footnote on next page.

In addition, the lower courts applied the settled law of this Court which invalidates, under due process, irrebutable presumptions which infringe on basic constitutional liberty where the presumed fact does not necessarily follow from the proven fact. Cleveland Board of Education v. LaFleur, supra, 94 S. Ct. at 798-800; Vlandis v. Kline, 412 U.S. 441, 452; Stanley v. Illinois, supra, 405 U.S. at 654. It follows a fortiori that a conclusive presumption which violates the traditional rational relationship test of equal protection also violates this due process standard.

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footnote from preceeding page.

* The District Court invalidated the rule on the alternative ground that, though neutral on its face, it establishes on inherently sex-based classification meriting strict scrutiny.(A33-37) This aspect of its holding is clearly distinct from the invalidation of the rule under the rational relationship test. The Circuit Court specifically found it unnecessary to reach the question of sex-discrimination. (A7, fn. 5)

The lower courts both assumed the state interest, profferred -- to further the creation of a properly moral scholastic environment -- to be a legitimate object of regulation (A8, 25). For the purposes of this Opposition, Respondents deem it unnecessary to challenge this assumption. Thus, the only question is, that framed by the Circuit -- whether the Pettey rule "advances that objective in a manner consistent with the Equal Protection Clause," Reed v. Reed, 1971 404 U.S. 71, 76. (A8). In Schware v. Board of Bar Examiners, supra, a case which dealt with the state's requirements for admission to practice law, this Court framed the test in terms apposite to the case at bar:

> "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the

Bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."

353 U.S. at 239 (emphasis added)

The Circuit described the School Board as "offer[ing] three possible rationales for the rule: 1) unwed parenthood is prima facie proof of immorality; 2) unwed parents are improper communal role models, after whom students may pattern their lives; 3) employment of an unwed parent in a scholastic environment materially contributes to the problem of schoolgirl pregnancies."(A8)* Adopting

* Before this Court, the School Board purports to make a hasty retreat from the first rationale, claiming that it is not the immorality per se, but the disapproved status of unwed motherhood that motivates the rule. This contention, belied by the record below, should be viewed suspiciously by the Court, not only because it sets up an illusive distinction, but also because the "initial primacy (of the immorality per se argument) casts a shadow over th[is] case." See Cleveland Board of Education v. La Fleur, supra, 94 S. Ct. at 797,fn9 and at 802, fn 1 (Powell, J., concurring). The expansiveness of the rule (See Counterstatement of the Case, supra, p. 4 para. 4), which far transcends the role-modeling rationale, further illustrates the primacy of the first rationale.

the findings of the District Court, the Circuit affirmed on the ground that "the policy created an irrational classification." (A7, 25).

With respect to the first rationale, that unwed parenthood is prima facie proof of immorality, the Circuit found, on the basis of Pettey's testimony, that a conclusive presumption of immorality motivated the rule. (A9, fn. 7). The Circuit quoted the District Court's analysis of the over-inclusiveness of the rule (A10-11):

> [N]o consideration would be given to the subsequent marriage of the parent or to the length of time elapsed since the illegitimate birth, or to a person's reputation for good character in the community. A person could live an impeccable life, yet be barred as unfit for employment for an event, whether the result of indiscretion or not, occurring at any time in the past. But human experience refutes the dogmatic attitude inherent in such a policy against unwed parents. Can it be said that an engaged women, who has

premarital sex, becomes pregnant, and whose fiance dies or is killed prior to their marriage, is morally depraved for bearing the posthumous child? The rule allows no compassion for the person who has been unwittingly subjected to sexual relations through force, deceptive design or while under the influence of drugs or alcohol, yet chooses to have the child rather than to abort it. The rule makes no distinction between the sexual neophyte and the libertine. In short, the rule leaves no consideration for the multitudinous circumstances under which illegitimate childbirth may occur and which may have little, if any, bearing on the parent's present moral worth. (A10, 29)

* * * *

Indeed, the superintendent's fiat, altogether unsupported by sociological data, equates the single fact of illegitimate birth with irredeemable moral disease. Such a presumption is not only patently absurd, it is mischievous and prejudicial requiring those who administer the policy to "investigate" the parental status of school employees and prospective applicants. Where no stigma may have existed before, such inquisitions by overzealous officialdom can rapidly create it. (A11, 30)

Conversely, the rule fails the test of rationality in that it is also invid-

iously underinclusive. Eisenstadt v. Baird, supra, 405 U.S. at 448; Railway Express Agency v. New York, 336 U.S. 106, 112-113. Though directed at immorality based not on unwed parenthood (A20, n.3, 34) but upon the precedent non-marital sex conduct, the rule ignores those who engage in extra-marital sex (A11) and in pre-marital sex, but avoid by nature or design the conception, birth, or responsibility for rearing of the issue.(A10)* Many single women are untouched by the rule, as are virtually all men, since "[u]nless the man either admits paternity or is so adjudged judicially, it is virtually impossible to prove his involvement." (A34, 36)

The above findings, upon which the irrationality of the rule is based, are not only inappropriate subjects for this Court's review, they are also undisputed.

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* See fn. page 4, supra.

With respect to the School Board's second, after-the-fact rationale that the rule is aimed not at sexual morality, but at the status of unwed parenthood as a role model, the Circuit likewise adopted the District Court's finding that the record failed to establish a rational nexus between the status and the claimed attitudinal impact on students:

> In absence of overt, positive stimuli to which children can relate, we are convinced that the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy is highly improbable, if not speculative. We are not at all persuaded by the defendants' suggestions, quite implausible in our view, that students are apt to seek out knowledge of the personal and private family life-styles of teachers or other adults within a school system (i.e. whether they are divorced, separated, happily married or single, etc.), and, when known, will approve of and seek to emulate them." (A13, 33)

The Circuit also found the third rationale, the encouragement of schoolgirl

pregnancies,"profferred by the [School] District in the hopes of salvaging the Pettey rule" bereft of support in the record. (A13)

In sum, testing the rule against the minimal rationality standard, the lower courts unanimously found the rule to be lacking in factual foundation. This Court would have to reverse these findings to reverse the judgment below. Such is not a matter worthy of the writ.

CONCLUSION

WHEREFORE, Respondents respectfully submit that the Petition should be denied.

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DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
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KATIE MAE ANDREWS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
Petitioners.

vs.

KATIE MAE ANDREWS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 507 F.2d 611, and is reproduced in Appendix A of the Petition. (pp. 1A-14A) The opinion of the United States District Court for the Northern District of Mississippi is reported at 371 F.Supp. 27, and is reproduced in Appendix B of the Petition. (pp. 15A-37A)

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 3, 1975. The petition for writ of certiorari was timely filed and was granted on October 6, 1975. This Court has jurisdiction pursuant to 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether a person has a right derived from or protected by the United States Constitution to bear illegitimate children.

2. Whether the failure to employ plaintiffs in defendants' school district because they were unwed parents of illegitimate children impinges upon some provision of the United States Constitution.

3. Whether a school district rule, neutral as to sex and race, which excludes parents of illegitimate children from consideration for employment as teachers or teacher aides in a small rural school district[1] violates the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

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1. The Drew Municipal Separate School District is a small school district located in a rural Mississippi Delta town. The town of Drew has a population of 2,574 individuals according to the 1970 United States Census Report.

STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. §§1981, 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000(d), et seq., and the Fifth and Fourteenth Amendments to the Constitution of the United States. The plaintiffs, both being single and parents of illegitimate children, sought an injunction voiding the school district's rule which excluded unwed parents of illegitimate children, both male and female, from consideration for employment as teachers and teacher aides. The plaintiffs also requested the district court to require the defendants to enter into contracts of employment with them.[2] The district court found the regulation to be unconstitutional as violative of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States[3] and required the defendants to execute contracts of employment with the plaintiffs.

The rule was adopted based upon the judgment that the role of a teacher, apart from imparting instruction, is to mold character and development through being a "role model." (Pettey, Trans., pp. 7, 8) The rule was not promulgated to automatically deny consideration for employ-

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2. Both plaintiffs made application for employment with the defendant school district. Plaintiff Rogers indicated on her application that she was single and had one child. This child was illegitimate and she later gave birth to another illegitimate child. Plaintiff Andrews indicated on her application that she was single and had no children when in fact she had one illegitimate child. When questioned about this matter, she readily admitted that she "lied about it." Her attitude as to falsification of an employment application by anyone was, "If that's the only way they could get the job, by lying, sure." (Tr. pp. 65 & 67—March 20, 1973)

3. The district court held that no rational relation exists between the school district's rule and educational objectives and further that in the alternative the rule was a sex-based classification and therefore inherently suspect, but the court of appeals did not address this issue since it affirmed the district court "upon traditional equal protection grounds."

ment as teachers and teacher aides of unwed parents of illegitimate children on the basis that such parents are immoral, but on the basis that such parents regardless of their present status of morality are improper models for the many roles occupied by the teacher—"educator, adviser, friend and, at times, parent-substitute"—during the formative years of primary and secondary education. *Goss* v. *Lopez*, 419 U.S. 565, 42 L.Ed.2d 725, 95 S.Ct. 729 [No. 73-898], decided January 22, 1975 (Powell, J., dissenting).

The rule is rested on educational considerations; the superintendent's testimony is clear that educational reasons were involved. (Id., pp. 7, 8)

The superintendent's testimony concerning morals has been overworked and misapprehended by the lower courts. The superintendent was not saying that the rule necessarily would separate the moral from the immoral in litmus paper fashion. Rather, his moral concern was that in the school year 1971-1972, twenty-eight girls ranging in age from thirteen to seventeen dropped out of school because of pregnancy. (Id., p. 8) He believed that the influences created by application of this rule would arrest this trend. Without insinuation that those who fell afoul of the rule were necessarily presently immoral, the superintendent believed that unwed parents of illegitimate children in teaching positions would add to rather than help arrest this alarming trend in his district. (Id., p. 9)

In this case of first impression, sociological and psychological testimony was preeminently important. The district court only paid lip service to the expert testimony, 371 F.Supp. 31, as being of a "judgmental nature unsupported by any studies that provide a solid factual basis for their conclusions." Shunning these important opinions of experts, the court rested its decision primarily on *a priori* assumptions as to the invalidity of the classification

without considering how the classification works in practice. It is for this reason that the testimony of the experts, both pro and con, deserves considered attention.

Dr. Kenneth Clark while testifying for the plaintiffs opined that "in addition to [the] basic academic skills and competences a teacher ought to communicate to students, even from the early grades, the importances of other human characteristics." (Dep. Clark, p. 13) He conceded much importance to "role modeling", wherein growing individuals derive models for their own behavior, attitudes and feelings from adults and teachers. (Id., p. 15)[4] He readily admitted that teachers "do affect the values of young people who come in contact with them"; that "unwed parenthood [is] a component or part of role model" and "it may well be a factor in influencing the child". (Id., p. 16) He further admitted that "teachers not only communicate academic knowledge they communicate an approach toward human beings, a style of life". (Id., p. 17)

The Reverend John Perkins testifying for the plaintiffs stated that he was of the opinion that a teacher has great effect in a classroom over the moral development and character development of a child. It was his belief that the teacher serves as a model for the student. (Tr., p. 26—May 31, 1973)

Dr. Ernest van den Haag, scholar and writer in the fields of education, sociology and psychology, identified

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4. "* * * in the process of growing up human beings look to other human beings for what are considered desirable characteristics, and sometimes undesirable, and that adults, particularly significant adults in the life of every human being, become a model of what that particular individual will strive toward. * * * It means that the growing individual looks to adults, and sometimes peers, as a model for their own behavior and attitudes and feelings." (Id., p. 15)

and elaborated upon a basis for the rule of the Drew Municipal Separate School District. He testified that the family and monogamous marriage are protected American institutions. (Deposition of Dr. van den Haag, p. 8) Sexual activities are and have been regulated within the social and legal norm of marriage. It then follows, according to Dr. van den Haag, that those who do not conform to the institution of marriage "are legitimately made to suffer some disadvantages, particularly if they deliberately fail to follow that institution." (Id., p. 8)

Teachers, in van den Haag's view, perform two functions: (1) They teach cognitive knowledge to their students, and (2) "Transmit and, inseparably from this cognitive knowledge, the cultural heritage of the society or community in which they are employed." The cultural transmission role is particularly strong in the lower grades, since the primary influences on children are the home and the school. The emotional attitudes of the teacher are readily communicated to his students by the teacher's personality and conduct. The authority of the teacher turns on his acceptance by the pupil. The acceptance reaches the degree of receiving the teacher as a person wherein the students:

> "take as a model to some extent, and indentify with and, in fact, in effect, build their own identity on the teacher's general conduct, behavior, etc., to the extent to which they are aware of it." (Id., pp. 9-11)

The importance of proper role models is central to Dr. van den Haag since "students seem to have sources of information that I never have been able to fully find out, but they seem to always know everything about their teachers." (Id., p. 11) Because Drew is a small town with a small school, Dr. van den Haag believed that "whether

by gossip or information or general curiosity about the lives of adults, that the students would know" about the private lives of their teachers. (Id., p. 13) There is an accompanying danger, according to van den Haag, that children fond of a particular teacher would accept that teacher totally and therefore accept her behavior that the surrounding community regards as unacceptable. (Id., p. 14) Dr. van den Haag believes that even arithmetic teachers in grade school will tend to communicate with the children on an emotional basis about everyday events and occurrences even within their own family. (Id., p. 16) It will simply be unavoidable that the teacher would express his own values in the classroom[5]. Finally, van den Haag believes that education in the lower grades is not just a matter directed to the intellect:

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5. Teaching such subjects about, say, American history and social studies, family and, perhaps, today, I do not know whether this is the case in Drew, sexual education and education in family patterns. It is unavoidable, it seems to me, that the pupils will be curious about the teacher's own family life, past and present conduct, and it is unavoidable that the teacher, whether he likes it or not, expresses his own values in the classroom.

If the teacher feels it is all right to have illegitimate children or children out of wedlock, such a teacher can hardly, at the same time, pretend to the children in the classroom that it is wrong.

Clearly, the children would notice the inconsistency.

On the other hand, if the teacher feels it is wrong himself or herself, and yet has had children out of wedlock, I think it would be hard for the teacher to present himself to the classroom as a repentant sinner, who has done something that is wrong. So, in effect, the teacher would be compelled, I would say, to tell the children that it is all right to have children out of wedlock.

And that, of course, would have one of the two effects I mentioned before. If the children accept the teacher in general, they will accept his teaching. If, on the other hand, the teacher has been unacceptable for other reasons to the children, this behavior and this expression of values will make him even more unacceptable, to such a point as to compare his or her ability to teach the children anything.

(Dep. of van den Haag, pp. 17 & 18)

> "Children learn and learn only because they like their teacher and wish to please him. Children learn for the love of the teacher, so to speak. This is less so as the children grow older, but it never stops. It is hard to learn from a teacher you don't care for; impossible for a young child, I would say." (Id., p. 18)

The teacher cannot teach any subject unless a child accepts him, likes him, and admires him. Along with role modeling there exists role assimilation in which children assume and learn to assume an identity of their own formed by and incorporating part of the personality, conduct and values of adult models.

Schooling as seen by Dr. van den Haag is an effort to impart the selected cultural heritage of the society of which one is a part. This cultural transmission is a selective process. All the bad traits of a national character such as propensity for crimes of violence should be avoided and ideas of honesty, proper behavior and restraint or avoidance of certain sexual practices, including those the subject of the regulation, should be taught. (Id., p. 24)

Dr. van den Haag also highlighted the emphasis of the rule upon status and not morality. In practice, it would be impossible to regulate whether a prospective teacher had extra or premarital sex. On the other hand, the status of having an illegitimate child will be readily observable in a town such as Drew.

The rule clearly regulates the situation of an individual having an illegitimate child rather than the situation of an individual engaging in premarital sex. (Id., p. 30)

Addressing the issue of the supposed severability of teachers' conduct from students' values and inferentially their sexual practices, Dr. van den Haag commented:

> "The impact varies with the degree of like and admiration that the students have for the teacher. But the impact is invariably great in elementary grade schools and up to, I would say, junior high school. . . . There are, I think, numerous biographies and autobiographies of people who report on the impact that an admired teacher had on their own development and personality. I think that it is indisputable that when you have daily and intimate and extended contact with a person much older than you and you are very young and plastic, so to speak, that person will, whether he wants to or not, influence you and participate in the formation of your personality." (Id., pp. 45-46)

The vital center of Dr. van den Haag's testimony is that children are sent to school to learn useful and accepted patterns of society and to internalize them. "They internalize them not so much by what the teacher formally teaches but what he is and does in their relation to him."

Dr. Buchanan, presently Dean of the School of Education at Delta State University, who served in the capacities of principal, assistant principal and superintendent for over 22 years in school systems throughout Mississippi agreed with the other authorities, testifying that "teachers teach by concept and by example". (Tr., p. 32, May 31, 1973) Based upon his many years of working directly with teachers and students, he held to the view that: "In the formative years, in the beginning years, the elementary, * * * the teacher has more impact, more influence even than parents in many cases. And certainly as much in most cases. And most of all in many cases." (Id., pp. 32, 33) The sum of his testimony was that it would be very destructive to a school system not only as to the students but as to the other teachers and parents

to allow parents of illegitimate children to teach in the system.

Mrs. Ruby Nell Stancill, a teacher in the Drew school system for 22 years, testified that a teacher has a great responsibility in the moral and character development of school children since children desire to imitate their teachers. It was her opinion that a teacher's conduct and life style have a great influence upon the students. (Tr. 96-7, May 31, 1973) She expressed concern that it would be very difficult if not impossible to explain why an individual should not give birth to a child out of wedlock if one or more teachers in the district had so done. (Id., p. 101)

SUMMARY OF ARGUMENT

There is no right derived from or protected by the Constitution of the United States for unwed persons to bear illegitimate children. Therefore, the failure of defendants to employ instructional personnel based upon such status does not impinge upon a constitutional right.

The school district has a right and a duty to promulgate reasonable rules in regard to employment of instructional personnel to meet the special circumstance of the school district. The rule in question is constitutional and was so applied in this case.

The defendant school district, faced with the grave problem of an alarming rate of increase as to illegitimate births among its students, properly applied a rule which had been formulated based upon the distilled wisdom of educators and others possessing expertise in this field. It is beyond cavil that teachers and teacher aides who have wilfully committed certain illicit acts, which acts have

placed them into the status of unwed parents of illegitimate children, cannot function properly in their role as "educator, adviser, friend and, at times, parent-substitute." It is self-evident that such persons regardless of their present state of morality cannot serve as a proper "role model" for the children attending school in the Drew Municipal Separate School District. Again, we emphasize that the rule does not concern itself with the present status of morality of an individual but serves the office of protecting the students from being subjected to improper "role models" in their educational training. The Court is on judicial record that in certain areas of human involvement, appearance is sometimes exalted over substance. The Court with Mr. Justice Marshall as its organ announced that:

> "Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the *appearance* of bias." *Peters* v. *Kiff*, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163. (Emphasis added)

If appearances rise to the dignity of constitutional recognition when an adult voluntarily or by fortune is placed in circumstances which may dictate his or her future for a finite period, can it be gainsaid that appearances (role models) are of even greater importance in circumstances of an individual during his or her formative years which dictate their entire future?

ARGUMENT

I.

The district court's finding that the defendants' failure to employ the plaintiffs was based upon a constitutionally impermissible reason, i.e., the bearing of illegitimate children, conflicts with the Court's decisions in Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701, and Perry v. Sindermann, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694.

The district court lacked jurisdiction to consider these claims for employment. 28 U.S.C. Section 1343 requires the presence of a constitutional right. Where employment is denied or terminated, some protected interest in "liberty" or "property" rooted in the Constitution must be implicated to grant jurisdiction. *Board of Regents* v. *Roth*, supra. In the case of the new applicant, Andrews, there is no "right" to employment such as would confer jurisdiction; there is only a countervailing duty of the State not to infringe certain definable constitutional guarantees. Whatever actionable right to employment exists springs only from a constitutionally protected interest. Plaintiff Rogers, who was not rehired, has failed to allege the existence of any rules, tenure or understanding that "would justify any legitimate claim of entitlement to continued employment." *Perry* v. *Sindermann*, supra.

Both claims, if they lie, must rest on the asserted right to be free of barriers that penalize parents of illegitimate children. Is such status constitutionally protected? If it is, it rests on some penumbral First Amendment right to complete liberty of procreation. True enough, certain activities relating to marriage are in this zone of personal privacy, *Roe* v. *Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93

S.Ct. 1409, but the Court has confined this constitutional right to sexual activity within the confines of marriage. "Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner* v. *Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Again, the rights growing from childbirth are ". . . the right of the individual to marry, establish a home, and bring up children." *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1924). Plaintiffs have misread these cases and have in effect found a fundamental right to procreate outside marriage which does not exist. Where race is not a factor, states have a wide latitude in prohibiting illicit conduct, none of which could be characterized as constitutional. *McLaughlin* v. *Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964). Thus, this suit for employment must rise or fall on the existence of constitutional protection for the activity practiced. Unless this protection is present, the state may deny a benefit to a person without recourse.

Neither this Court nor any other court has ever placed its imprimatur upon the bearing of illegitimate children. Conversely, the Court has always recognized a sovereign's justified concern and interest in the sanctity, preservation and encouragement of marriage and has repeatedly upheld the sovereign's right to enact certain laws to that end, e.g., statutes dealing with bigamy, adultery, bastardy, etc.

Marriage is the very cornerstone of western civilization, and any element which might tend to erode this foundation is and should be of serious concern to all. The Chief Justice acknowledged for the Court in *Boddie* v. *Connecticut*, 401 U.S. 371, 374, 28 L.Ed.2d 113, 91 S.Ct. 780, "the basic position of the marriage relationship in this society's hierarchy of values."

This Court has long been on record that rules, regulations and policy which proscribe conduct which is inimical to the sanctity of marriage are not only constitutional but are praiseworthy. In a somewhat analogous case to the case sub judice the Court upheld an Act which denied the right to vote to any person who was in the "status" of a bigamist or polygamist. The Court opined that the Act did not proscribe the commission of the offense but rather the "status". The Court was of the opinion that Congress had the authority to constitutionally attack such "status" and reasoned that:

> "For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, selfgoverning commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization, the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end, no means are more directly and immediately suitable than those provided by this Act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment." *Murphy* v. *Ramsey*, 114 U.S. 15, 29 L.Ed. 47, 5 S.Ct. 747

Sounding the same moral note the Court in *Davis* v. *Beason*, 133 U.S. 333, 33 L.Ed. 637, 10 S.Ct. 299 admonished that such conduct:

> Tend[s] to destroy the purity of the marriage relation, to disturb the peace of families, to degrade

> woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved purnishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community."

Murphy and *Davis* were cited by this Court as recently as June 24, 1974 in *Richardson* v. *Ramirez*, 418 U.S. 24, 41 L.Ed.2d 551, 94 S.Ct. 2655.

Although writing in dissent in *Boddie*, supra, no member of the Court disagreed with Mr. Justice Black's characterization of marriage:

> "It is not by accident that marriage and divorce have always been considered to be under state control. The institution of marriage is of peculiar importance to the people of the States. It is within the States that they live and vote and rear their children under laws passed by their elected representatives. The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain, and dissolve marriages." 401 U.S. 390

Although the Court has never condemned the issue of illicit unions, it has in the past allowed a state law to stand against a constitutional attack, which law came down hard upon the illegitimate issue rather than the parents. *Labine* v. *Vincent*, 401 U.S. 532, 28 L.Ed.2d 288, 91 S.Ct. 1017.

II.

The school district rule, neutral as to sex and race, does not violate the Due Process Clause and/or Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

There is perhaps no more basic precept of law than that the enactments of a legislative body are presumed to be valid. The burden of proving them invalid is a heavy one and rests squarely upon the plaintiffs in this case.

The Court in *F.H.A.* v. *Darlington*, 358 U.S. 84, 90, 91, 3 L.Ed.2d 132, 137, 79 S.Ct. 141, in addressing itself to the constitutional validity of a section of the National Housing Act, stated:

> "If we take as our starting point what the Court said in the Sinking Fund Case, 99 U.S. 700, 718, 25 L.Ed. 496, 501—'every possible presumption is in favor of the validity of a state statute, and this continues until the contrary is shown beyond a rational doubt.'—We do not see how it can be said that the 1954 Act is unconstitutional as applied."

The presumption of constitutionality of a statute is the postulate of constitutional adjudication. *New York* v. *O'Neill*, 359 U.S. 1, 3 L.Ed.2d 585, 79 S.Ct. 564.

In *Salsburg* v. *Maryland*, 346 U.S. 545, 550, 98 L.Ed. 281, 288, 74 S.Ct. 280, the Court announced that:

> "[W]e do not sit as a super legislature or a censor. 'To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.'" (cases cited omitted)

In *McGowan* v. *Maryland*, 366 U.S. 420, 425, 426, 6 L.Ed.2d 393, 399, 81 S.Ct. 1101, Mr. Chief Justice Warren, speaking for the Court, enunciated that:

> "[A]lthough no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Mr. Justice Black, speaking for the Court in *Ferguson* v. *Skrupa*, 372 U.S. 726, 730, 10 L.Ed.2d 93, 97, 83 S.Ct. 1028, stated that "[w]e have returned to the original constitutional purpose that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Further, at 372 U.S. 732, we find the admonition that "[s]tatutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution."

The Chief Justice in his dissent in *Vlandis* v. *Kline*, 412 U.S. 441, 462, 37 L.Ed.2d 63, 77, 93 S.Ct. 2230, recognized that:

> "literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved on by individualized determinations so as

to avoid the untoward results produced here due to the very unusual facts of this case. Both the anomaly present here and the arguable alternatives to it do not differ from those present when, for example, a State provides that a person may not be licensed to practice medicine or law unless he or she is a graduate of an accredited professional graduate school; a perfectly capable practitioner may as a consequence be barred 'permanently and irrebuttably' from pursuing his calling without ever having an opportunity to prove his personal skills."

The rule in question serves a legitimate state interest and has a rational relationship to such interest and does not conflict with the Fourteenth Amendment to the Constitution of the United States.

The Court announced in *Adler* v. *Board of Education*, 342 U.S. 485, 493, 96 L.Ed. 517, 524, 72 S.Ct. 380, that,

"[a] teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the State has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps."

The above referred to duty and right of a school district was reaffirmed in *Beilan* v. *Board of Ed. of Phila.*, 357 U.S. 399, 2 L.Ed.2d 414, 78 S.Ct. 1317.

When the Court was again called upon to address itself to the right and duty of a state in regard to public education and the employment of teachers, admonished that "[t]here can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize." *Shelton* v. *Tucker*, 364 U.S. 479, 485, 5 L.Ed.2d 231, 235, 81 S.Ct. 247. In support of this proposition, the Court cited *Adler* v. *Board of Education*, supra. Continuing, Mr. Justice Stewart, speaking for the Court, affirmed the proposition announced in *Beilan*, supra, that there is "no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors."

Although the Court in *Pickering* v. *Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731, upheld a teacher's right to criticize the school board (a First Amendment right not present in the action sub judice) in *CSC* v. *Letter Carriers*, 413 U.S. 548, 564, 37 L.Ed.2d 796, 808, 93 S.Ct. 2880, Mr. Justice White, speaking for the majority, recognized that *Pickering* stands for the proposition that "the government has an interest in regulating the conduct" of its employees significantly different from those it possesses in connection with the citizenry in general.

Mr. Justice Powell in his concurring opinion in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 656, 39 L.Ed.2d 52, 69, 94 S.Ct. 791, recognized that

"[s]chool boards, confronted with sensitive and widely variable problems of public education, must be accorded latitude in the operation of school systems and in the adoption of rules and regulations of general application."

We submit to the Court that the rule promulgated by the Drew Municipal Separate School District does not operate against the present moral status of an individual school teacher or teacher aide, but operates against the example which such a teacher or teacher aide provides the students in the said school district. Both the district court and the court of appeals have opted for the position that an individual who seeks employment with the defendant school district should be given a due process hearing to determine whether or not his or her status as an unwed parent of illegitimate children would materially interfere with the educational processes of the school district. We suggest to the Court that such a hearing in and of itself would cause material disruption of the said educational processes and would avail little since it is not the present moral character of the individual that is in question but the individual's role in regard to the students attending school in the defendant school district. Mr. Justice Powell in his dissenting opinion in *Goss* v. *Lopez*, 419 U.S. 565 [No. 73-898], decided January 22, 1975, joined in by the Chief Justice, Mr. Justice Blackmun, and Mr. Justice Rehnquist, properly stated the role of a teacher when he stated that:

> "The role of the teacher in our society historically has been an honored and respected one, rooted in the experience of decades that has left for most of us warm memories of our teachers, especially those of the formative years of primary and secondary education."

He further acknowledged that a teacher must occupy many roles, such as "educator, adviser, friend and, at times, parent-substitute." Although speaking in another context, Mr. Justice Powell's recognition that "[w]e have relied for generations upon the experience, good faith and

dedication of those who staff our public schools" is equally applicable to the situation now before the Court.

This Court acknowledged in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686, that public schools are the "principal instrument[s] in awakening the child to cultural values." 347 U.S. 493. While this acknowledgement was of importance then, it is of greater moment today as recognized by Mr. Justice Powell in *Goss*, supra:

> "In an age where the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools."

The beliefs of at least two of plaintiffs' experts are at total war with this universally recognized principle. Since such fallacious beliefs underpin their expert conclusions, such conclusions are of little value.

Dr. Edmund Gordon testified that while schools have an influence on the development of specific academic skills, they "tend to have relatively little impact on the so-called moral development of youngsters." (Dep.—Gordon, p. 25) It is interesting to note and also somewhat disturbing that Dr. Gordon is wed to the philosophy that in the selection of teachers he:

> "would probably shy away from the person who has completely abstained from sexual behavior, because, again in our society that is so atypical a pattern of behavior as to suggest some possible personal problem —less so, I would say, than a person who happens to have become pregnant possibly by accident out of expression of normal aspect of behavior." (Id., p. 26)

Adhering to this minority view, plaintiffs' witness, Ronald Samuda, added that "we have negligible effect when we attempt to teach values directly in the classroom." (Tr., p. 8—March 19, 1973—Samuda) His testimony is further discredited by his irresponsible statement, unsupported by any evidence, that "a great majority of the practicing teachers throughout the country * * * have participated in extramarital sex." (Id., p. 5)

Without even pausing for reflection upon such an all-condemning declaration, he plunged ahead as judge and jury and convicted the entire student body of Stanford University and three other unnamed universities of engaging in "premarital sex." (Id., p. 25)

Samuda's testimony and own moral values were summed up in one short answer when he emphatically admitted that he "believed in situation ethics." (Id., p. 22) The only concession that the witness made to the moral values which prevail in this country today is that when asked about the advisability of including homosexuals in teaching positions, in schools, he said he would like to think about that before forming an opinion. (Id., p. 34)

This constitutionally unassailable principle comes into even sharper focus when viewed in the light of the factual situation of the Drew School District. The total student enrollment for the district is 1,200. During the school year 1971-72 there were 28 schoolgirl pregnancies (Tr., p. 8, March 16, 1973, Pettey) reported in the age group of 13 to 17 years. It takes little knowledge of arithmetic to figure that this is approximately 10% of the number of schoolgirls of childbearing age in this school district.[6]

6. Approximately one-half of the school population (600) is female and approximately one-half of the group is of childbearing age (300).

This alarming rate of illegitimacy, coupled with the 35.2% of illegitimate births in Sunflower County (1971)[7] is more than ample support for this rule. (Pls. Exhibit #3) Armed with these figures, school administrators would be derelict in their duties not to fashion some type of policy to attempt to arrest this rising threat to the overall moral values of the community.

The Court of Appeals was of the opinion that there was no evidence in the record, other than speculation and assertions of opinion, to support the contention that the presence of parents of illegitimate children in a scholastic environment contributes to schoolgirl pregnancies. Although we submit that the statistics plus the opinions of school personnel and educational experts (including plaintiffs' witnesses) support such contention, the Court is on the record that the school district carries no such burden.

This Court in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 60-63, 37 L.Ed.2d 446, 93 S.Ct. 2628, the Chief Justice, writing for the Court, stated:

> "But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, any kind of state regulation is "impermissible." We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself. (Footnote

7. The rule in question will not only help to decrease the illegitimate births among the school population but will have an impact upon the overall future county statistics by feeding into the population adults who have been taught to disfavor bearing children out of wedlock.

omitted) Mr. Justice Brennan, speaking for the Court in Ginsberg v. New York, 390 U.S. 629, 642-643, 20 L.Ed.2d 195, 88 S.Ct. 1274 (1968), said: "We do not demand of legislatures 'scientifically certain criteria of legislation.' Noble State Bank v. Haskell, 219 U.S. 104, 110, [55 L.Ed. 112, 31 S.Ct. 186]." Although there is no conclusive proof of a connection between antisocial behavior [413 U.S. 61] and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding Roth, this Court implicity accepted that a legislature could legitimately act on such a conclusion to protect *"the social interest in order and morality."* Roth v. United States, 354 U.S., at 485, 1 L.Ed.2d 1498, quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 86 L.Ed. 1031, 62 S.Ct. 766 (1942). (Footnote omitted).

From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. (Cited cases omitted) 413 U.S. 60, 61.

* * *

The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional. 413 U.S. 62.

If we accept the unprovable assumption that a complete education requires certain books, see Board of Education v. Allen, 392 U.S. 236, 245, 20 L.Ed.2d 1060, 88 S.Ct. 1923 (1968), and Johnson v. New York State Education Depart., 449 F.2d 871, 882-883 (C.A.2 1971) (dissenting opinion), vacated and remanded to consider mootness, 409 U.S. 75, 34 L.Ed.2d 290, 93

S.Ct. 259 (1972), id., at 76-77, 34 L.Ed.2d 290 (Marshall, J., concurring), and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? "Many of these effects may be intangible and indistinct, but they are nonetheless real." American Power & Light Co., supra, at 103, 91 L.Ed. 103. Mr. Justice Cardozo said that all laws in Western civilization are "guided by a robust common sense . . . ." Steward Machine Co. v. Davis, 301 U.S. 548, 590, 81 L.Ed. 1279, 57 S.Ct. 883, 109 A.L.R. 1293 (1937). The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data. 413 U.S. 63."

The District Court and the Court of Appeals condemn the rule in question on the ground that such rule does not allow for the "innocent"[8] parents of illegitimate children who may not serve as an improper "role model." Rules

---

8. Several of the examples listed by the lower courts as "innocent" are themselves "suspect" classifications; i.e., premarital sex; sexual relations while under the influence of drugs or alcohol; sex by deceptive design; sexual neophyte. Although these examples may support a plea for compassion, they do not undercut the school district's authority to adopt a rule which serves a legitimate educational end.

and regulations that may in practice not be perfect but which serve a valid state interest rather than being condemned have been approved as constitutional by this Court. In *Weinberger* v. *Salfi*, No. 74-214, ... U.S. ....., 45 L.Ed.2d 522, 95 S.Ct. 2457, this Court recognized that a rule which denied social security benefits to a surviving wife or a stepchild who had their respective relationships to a deceased wage earner for less than nine months prior to his death "undoubtedly excludes some surviving wives who married with no anticipation of shortly becoming widows." The Court further was of the opinion that "it likewise may be true that the requirement does not filter out every such claimant" because of certain circumstances while acknowledging that the regulation may cut against and exclude widows who were truly "innocent" of any wrongdoing or sham arrangements. Even so this Court declared the regulation to be constitutional.

Striking this same judicial chord, the United States Circuit Court of Appeals for the Eighth Circuit upheld as constitutional a school district policy that prohibited employment of a husband and wife in an administrative-teacher relationship. *Keckeisen* v. *Independent School District*, 509 F.2d 1062, cert. denied, 44 U.S.L.W. 3194 (Oct. 6, 1975). The policy was formulated on the assumption that such a husband-wife relationship may cause in the future a conflict of interest and further may create a morale problem among the other teachers. Although there was no proof that the relationship of the plaintiff, principal of the school, and his wife, a teacher at the same school, caused any problems and in fact the proof was to the contrary the Court opined that where "possibilities of conflicts of interest exist, the Board should [not] be placed under a constitutional burden of having to wait until a conflict of interest becomes a problem situation before it can take action." p. 1066. The Court further was

of the opinion that such a regulation did not impinge upon the plaintiff's right to marry. In answer to the plaintiff's contention that the regulation includes couples who may not have a conflict of interest, the Court answered:

> "We have no doubt that in many cases where husbands and wives are employed in supervisor-supervisee capacities, the married couple make an exemplary effort to maintain fairness, but we cannot say a policy based on the assumption that married couples are susceptible to the natural prejudices of their relationships is irrational, arbitrary, or capricious." p. 1066.

We suggest to the Court that the case law, expert testimony presented at trial, common experiences and just plain common sense underpin rather than undermine the policy of the Drew Municipal School District. Viewed in light of the facts that exist in the school district and the county as to the high rate of illegitimate births, the questioned policy is not only reasonable but compelling. Such a policy is necessary to vouchsafe for the school children of Drew teachers to whom they may look not only for cognitive knowledge but as "adviser, friend and, at times, parent-substitute." How can it be seriously gainsaid that the questioned policy serves a legitimate school interest which meets all constitutional commands.

Plaintiffs attempt to counter defendants' argument by asserting that the act of giving birth to an illegitimate child is not in conflict with the moral values of the legal community. After plaintiffs' attorney advised the Witness Gordon that in 1971 in Sunflower County, Mississippi, where the Drew School District is located, 44.6% of the live, non-white births were illegitimate he stated in effect that it was therefore his opinion that the bearing

of illegitimate children was not contra to the moral values of the local non-white community. (Dep. Gordon, p. 28)

The witness further opined that there exist in the local community two separate and different cultures; i.e., a white culture with its own moral values and lifestyle, and a non-white culture with its own moral values and lifestyle. (Dep. Gordon, pp. 29-30, May 29, 1973) When questioned about the school policy as to parents of illegitimates, he stated that "to try to impose the same standard on both cultures, now I think, is not only incorrect but discriminatory." (Id., p. 30) In further recognition of his beliefs, he condemned the school district for its efforts to arrest this alarming rate of illegitimate births by announcing:

> "In this particular instance I am suggesting that in a society where a particular pattern of behavior is the norm, to rule that pattern of behavior out as illegal, unacceptable, discriminates against the cultural group that practices that behavior." (Id., p. 33)

In a further attempt by the plaintiffs to establish that giving birth to an illegitimate child is not against the moral values of the local non-white community, they presented the testimony of Ms. Mae Bertha Carter, a black citizen of the Town of Drew to the effect that "morals have nothing to do with an unwed mother" having an illegitimate child. (Tr., p. 18—May 31, 1973) The witness readily admitted that she had a "child that was the parent of an illegitimate child." (Id., p. 19) Even though the witness held to these beliefs, she admitted on cross-examination that the Drew Public Schools had a problem with unwed schoolgirl pregnancies. (Id., pp. 19-20)

In furtherance of this position, plaintiffs called as a witness Ms. Hamer, a black citizen of Sunflower County,

who testified that the actions of these plaintiffs and their conduct in regard to bearing illegitimate children "as per the black community are quite moral." (Tr., p. 91—March 20, 1973)

Pressing forward with this same point the plaintiffs offered the testimony of Violet Burnett, a black citizen of the community, who is an unwed parent of an illegitimate child and had previously been employed with the Drew School District. The tenor of her testimony is reflected from the following colloquy:

> Q Well, do you feel that it would be wrong for any of the students at the Drew High School to engage in sexual intercourse?
>
> THE WITNESS:
>
> I feel like if that's what they want, they can do it. That's just the way I feel.
>
> MR. TERNEY:
>
> Q In other words, if you were teaching at Drew and some school girl came up to you, 13, 14, 15 years old, and she looked up to you as a teacher and asked you, said she really had a big problem, she wanted to discuss it with you, she wanted to have sexual intercourse with her boyfriend, you would tell her, "It's all right, go right ahead"?
>
> A I would tell her if that's what she wanted and she felt like that's what she wanted to do, go right ahead. (Tr., p. 32—March 20, 1973)

The plaintiff Rogers was questioned about her moral beliefs in this regard and such is documented by the following:

Q Now, what is your feeling about the moral issue? Is it right or wrong for you or for any individual to have sexual intercourse and not be married?

A Well, I can't say it's right and I can't say it's wrong. Because I think it's left up to you as long as you are not hurting anyone else. I think you should do whatever you feel is right.

Q Do you intend to have any more children?

A I don't know.

Q. Haven't decided?

A No.

Q But you may have more children, even though you are not married?

A I don't know. (Tr., p. 43, March 20, 1973)

The moral values of the plaintiff Andrews have been previously indicated by her testimony concerning the falsification of her application and her testimony as to the moral aspect of having illegitimate children is substantially the same as that of the plaintiff Rogers. (Tr., pp. 60 & 64 & 67, March 20, 1973)

It is somewhat ironical that in the year 1975 plaintiffs who are members of the class which sued this school district to bring about total integration are now in all practicality asking this Court to turn back the clock and to recognize and treat the populace of the Drew school district as two separate and distinct cultural groups. Not only was this a surprise to the defendants but the district judge after hearing certain testimony was prompted to ask the witness if he was of the opinion that the "Supreme Court was wrong in Brown versus Board of Education in ordering integration of education." (Tr., p. 11, March 19, 1973)

Because this interpretation of the testimony may appear incredulous we set out the following for the benefit of the Court:

> Q Let me ask you this question. In terms of the rule itself there has been testimony to the effect that the rule was created in order to create a proper image for black children. Is it possible to infer that this rule, in fact, is detrimental to the best interests of black children in a situation where a majority or a large number of those children, say a third or more, a large number of those children come from homes with a matriarch or come from homes which have an unwed parent?
>
> A Well, as a matter of fact, I think that to infer that a teacher must be a middle class person could almost be psychologically detrimental to black children. Because what you are really doing is introducing a foreign, an alien value system. There are differences between the value system of black children and that of white children, and these have historical antecedents. It is based upon the fact of slavery. Where does the matriarchal society come from? Why? Is it a natural and ordinary, an African thing? In my opinion, it is not. Africans have a very, very strict code of morals. What has occurred in the interim is that as a result of slavery the male slaves were deliberately taken away from the family, and this was done in order to prevent unity. And also, the tribal groups were broken up, the family was broken up and males were deliberately removed from the family so that there would not be rebellion. This was understandable because slavery was a fact. Now, this historical fact, in my opinion, is the reason why you have a sort of matriarchal tendency within the black community.

Now, the point I am trying to make is that there is a kind of value system within the black community, there is another kind of value system within the middle class white community. And these are different. And when you place a white Anglo-Saxon, Protestant, upper middle class person in a classroom to teach black children, you have conflicting values. And, in fact, I think that you would tend to produce an even more psychologically damaging effect than if you have this divergence of class structure.

Q Hence the real effect of this rule, in essence, to black children is indeed a very damaging one in terms of their personal psychologies?

A In my opinion, to introduce strange and alien values into a classroom is detrimental.

THE COURT:

Do you think, then, the Supreme Court was wrong in Brown versus Board of Education in ordering integration of education?

THE WITNESS:

No, I wouldn't go so far as to say that, Your Honor. What I am trying to say is that we need to look at the way in which we are going to organize education in view of the fact that we have tried to be fair. But it's not a simple matter. I don't think we can just suddenly say, "All right, let's put a lot of white teachers into black classrooms and then we can produce this kind of culture." It's not going to happen that way. The black people are a special kind of people. They are almost like a foreign people. I happen to have been born, for example, in Jamaica. There are differences between my value structure and the value structure of my colleagues who are white

Americans. This is what I am saying. That there are differences in value and that we must be cognizant of these and, in fact, to attempt to introduce new values can be psychologically damaging to these children. (Tr., pp. 9-12, March 19, 1973)

Q Are you familiar with the moral values in this section of the country, of the United States?

A I believe so.

Q And you have told the Court that in your opinion the black race holds different moral values and standards than the white race?

A Different values. A different set of values, a different set of psychological conditions. And that these psychological conditions have been determined by the historical antecedents of each particular group of people. And that there is a different value system within the white middle class community as opposed to the black community, because the black community has suffered many hundreds of years of slavery. (Id., p. 23)

MR. TERNEY:

Q Your testimony today, then, Doctor, is to the effect that in minority groups, and particularly in the black race, that in the home that there is a need for a strong dominate parent figure outside of the home that does not exist in the home, is that correct?

A Not necessarily. This is a presumption that has been made. The point that I have been making is this. There are many unscientific and untested hypotheses about the behavior of people. And that we tend to assume that it must be right simply because it is right and it is a part of the Anglo-Saxon, Protes-

tant ethic. And the Anglo-Saxon Protestant system happens to be one kind of system, which is not necsarily true for all people.

Q. Then, Doctor, do you feel it would be educationally sound, more sound than the situation we have now, for the school districts to employ black teachers for black classrooms?

A (No response)

Q Rather than a white teacher over a black classroom?

A In my opinion, it would be sound if—given two situations. And assuming that I were the superintendent of a district and I had two people of equal qualifications and where I had a predominantly black classroom and you were asking me which of these two people would I employ, in my opinion, I would tend to employ the black person. Because that is one other way of producing the kind of climate and the kind of affinity that is necessary for a good psychological atmosphere. (Id., pp. 28-29)

Plaintiffs have set sail upon a collision course with prior decisions of this Court. The Court after years of navigating through troubled waters has anchored in what it has considered to be a safe harbor. Acknowledging that it has not tied itself to the dock and still has room to drift when necessary to accommodate special circumstances we have serious doubts that the Court will veer from the beacon that no group has a constitutional right to preferential treatment based soley on race. We do not believe that this Court will say to the Drew School District—"you must recognize two cultures in your community and accommodate them both". No man can serve two masters. Since this is an impossible mandate for this small rural

school district to follow, such a command, in effect, would require these defendants to teach an alien doctrine to all, both Black and White, that marriage and family were no longer the cornerstone of this great nation but that such had been replaced by "a number of cultures inside the United States * * * where formal marriage is not so much the pattern but any variety of liaisons". (Dep. Gordon, p. 29)

We urge the Court not to strike down a policy promulgated for a laudable purpose and in no way impinges upon the constitutional rights of these plaintiffs. The Court has always allowed latitude to the executive and administrative bodies in determining the qualifications of their employees. It has long been recognized by courts:

> "That some human infirmities are beyond the control of the applicant may be unfortunate but it does not undermine the power of the Executive to hire only those whose employment will 'best promote the efficiency' of the public service." *Scott* v. *Macy*, 402 F.2d 644, 652 (Burger, Circuit Judge, dissent).

If this policy, born of necessity and reared in great hope and expectation, can not survive the strictures of the constitution then we hold faint hope for school administrators to fulfill their appointed role as guardians of the educational processes of this nation. The demise of this policy will cause irreparable damage to this small rural school district and retard if not completely destroy its efforts to "shape the attitude of young minds towards the society in which they live".

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, Petitioners urge the Court to declare the policy in question to be constitutional and allow this small rural school district to continue to carry out its function —education "perhaps the most important function of state and local governments".

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No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, et al.,

Petitioners,

—v.—

KATIE MAE ANDREWS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, et al.,
Petitioners,

—v.—

KATIE MAE ANDREWS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

Counter-Statement of the Questions Presented

1. Whether a rule barring employment of parents of out-of-wedlock children in a public school system is invalid under the Fourteenth Amendment as bearing no rational relationship to a legitimate governmental interest where no such barring exists for engaging in pre- or extra-marital intercourse, but only for the bearing and rearing of a child, where the rule takes no account of any of the circumstances of the conception and permits no curing of one's condemned status even by subsequent marriage of the child's parents, and where the rule applies

widely to school personnel, including such as have little or no relationship to students, and where there is no proof that the teacher's status was known by or had impact on students.

2. Whether a rule barring employment in a public school system is invalid under the Fourteenth Amendment as an interference with the parent-child relationship and the right of nurturance where the application of the rule could be avoided by surrendering for adoption, or abandoning one's child, and where the creation and maintenance of this basic human relation is punished by professional exclusion, economic deprivation, and the stigma of inferiority, which punishment falls on child and mother alike.

3. Whether a rule barring employment of parents of out-of-wedlock children in a public school system is invalid under the Fourteenth Amendment as a sex-based classification, where the rule has, in fact, been enforced only against women, and the manner of enforcing the rule is so designed that unwed fathers would never be touched, and the historic discriminatory condemnation of only unwed mothers perpetuated.

4. Whether a rule barring employment of parents of out-of-wedlock children in a public school system is invalid under the Fourteenth Amendment as a race-based classification where the rule has in fact been enforced only against Black women, where the statistical facts in the geographical area affected relating to illegitimacy and nurturance show that it would never be applied to members of the white race, and where the disparate patterns of illegitimacy are a legacy of earlier attempts through legal means to destroy family life among the Black population.

5. Whether a rule barring employment of parents of out-of-wedlock children in a public system is invalid under the Fourteenth Amendment as a race-based classification where it has the effect of stigmatizing a high percentage of Black children attending public school and generating feelings of inferiority which interfere with the education of Black children.

6. Whether a rule barring employment of parents of out-of-wedlock children in a public school system is invalid under the Fourteenth Amendment to the Constitution where it has the necessary effect of punishing the refusal or inability to use contraception or to obtain an abortion.

7. Whether in view of the confluence of basic rights threatened by the rule—the right of nurturance, the right not to be discriminated against on grounds of race and sex, and the right to freedom of choice on the matters of contraception or abortion—a governmental regulation affecting such rights is not subject to the strictest of scrutiny.

Counter-Statement of the Facts

In their statement of the case, petitioners have supplanted the true facts in this record with a wholly one-sided presentation. Respondents accordingly present this counter-statement of the case.

On May 28, 1969, the Drew Municipal Separate School District, located within Sunflower County, Mississippi, was ordered desegregated by the United States District Court for the Northern District of Mississippi. In the school year 1971-72, George Ferris Pettey, Superintendent of the Drew Public Schools orally promulgated a new rule barring employment to any person who "had been

a parent of an illegitimate child" (Trial transcript [hereinafter "Tr."], 3/16, Pettey, 3).[1]

Respondents Katie Mae Andrews and Lestine Rogers, both Black females who were barred from employment as teacher aides solely because of the operation of this rule, brought this action under 42 U.S.C., §§ 1981 and 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C., § 2000(d), *et seq.*, and the Fifth and Fourteenth Amendments to the Constitution of the United States.

Respondent Andrews[2] was a 1972 graduate of Mississippi Valley State University and was certified as a teacher holding a Class "A" certificate which licensed her to teach in any public school in the State of Mississippi (Tr., 3/20, 49). She applied to Drew for a position as a teacher aide (the only position available) and was not hired solely on account of the operation of Mr. Pettey's regulation (Tr. 3/16, McCorkle, 15-16, 24). Had she been employed at Drew as a teacher aide, her college education would have entitled her to a monthly salary of $450 (*id.* at 9). Instead, though trained as a teacher, she had to take night shift factory work at a distance from her home (Tr. 3/20, 55, 56).

Respondent Rogers was a 1971 Drew High School graduate who had been employed as a teacher aide in the School District for the year 1971-72, at a salary of

[1] A deferred appendix is being filed herein. Accordingly, all references are to the record. In the main, the record consists of a trial transcript which is separately paginated for the different dates on which the trial was had (March 16, 19, and 20, and May 31, 1973), as well as depositions which were introduced at the trial. Since the March 16 transcript has two separately paginated sections, references to those transcripts will also include reference to the witness whose testimony is the source of a particular statement.

[2] Since the initiation of this lawsuit Ms. Andrews married Mr. Lonzo Peacock. Hereafter she will be referred to as Ms. Peacock.

$250 a month (Tr. 3/16, McCorkle, 18-19). At the time she was first hired, she was an unwed parent (Tr. 3/20, 36), but there was no issue as to her employability on that account. However, upon the pronouncement by Mr. Pettey of his rule in the following year, Ms. Rogers was not reemployed solely because she was an unwed parent (Tr. 3/16, McCorkle, 19) and was thereby forced onto the welfare roles in order to provide for her child (Tr. 3/20, 43).

Both Ms. Peacock and Ms. Rogers, life-long residents of Drew, resided with the parents, siblings, and their own children in the respective family homes (*id.* at 42, 59). The District Court emphasized that the record showed that the plaintiffs had never attempted to "publicize their status" or to proselytize students; the Circuit Court made the same observation (Cert. Pet., App. 13, 23).

It was conceded by Ms. McCorkle, who interviewed for hiring purposes that, except for Mr. Pettey's rule, both respondents were in all respects fully qualified for the positions they respectively sought or held and that the sole basis for the denial of employment in the case of Ms. Peacock and the refusal to renew the contract in the case of Ms. Rogers was that each had had a child out of wedlock (Tr. 3/16, McCorkle, 14, 19).

In addition to respondents, three other Black women who had been employed in the Drew School System during the 1971-72 school year were also denied further employment, solely on the basis of their status as unwed parents: Ms. Betty Barnes, who like Ms. Peacock was a holder of a Class "A" certificate (Tr. 3/20, 4), and had been employed as a substitute teacher (Tr. 3/16, McCorkle, 41); Ms. Rosie Dean Mays, and Ms. Violet Burnett, both of whom had been teacher aides (*id.* at 42).

These five Black women were the only victims of Mr. Pettey's rule.

Mr. Pettey's Rule: Its Origin, Scope, and Application

Though four of these five women had been employed during the first year of Mr. Pettey's tenure at Drew, promulgation of the rule was completely unrelated to any complaint about their teaching or their unwed parent status. Mr. Pettey spontaneously created the rule simply upon learning the fact that unwed mothers were employed in the Drew schools (Tr. 3/16, Pettey, 10). He admitted that he relied on no educational authority supporting the utility of such an exclusion (*id.* at 24); nor did he consult with anyone or advise or seek the approval of the School Board (*id.* at 10, 16-17).[3] It was not until after this lawsuit was instituted that the School Board ratified the rule (*id.* at 16-17). The District Court found that "[t]he challenged rule was without question the brainchild of Superintendent Pettey arising from long-held personal convictions concerning the morality of school employees . . ." (Cert. Pet. App. 22).

The regulation, as delineated by Mr. Pettey at the trial, excluded from employment any unwed parent, regardless of when the birth occurred, the circumstances surrounding the pregnancy or birth, or the fact that the unwed parent may subsequently have married. The fact of unwed parenthood was in Mr. Pettey's opinion a "conclusive" basis for denying employment.[4]

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[3] Petitioners' statement that the rule "had been formulated based upon the distilled wisdom of educators and others possessing expertise in this field" (Petitioner's Brief (hereafter Pb) 10) is without foundation in the record.

[4] "The Court: . . . Suppose a woman had an illegitimate child and then later married either the father of the child or another man. When she presented herself to you she showed she was married and had a child, one child. Would you consider her for employment?

The Witness [Pettey]: No, sir, I would not.

* * * *

[Footnote continued on following page]

Mr. Pettey applied the rule, not simply to teaching personnel, as petitioners would have this Court believe, but to almost every job classification within the School District, including teachers, teacher aides, cafeteria operators, dietitians,[5] librarians, gym teachers, secretaries, principals, P.T.A. presidents, nurses, social workers, and voluntary workers (Tr. 3/16, Pettey, 22-23). Indeed, the only school personnel Pettey wasn't sure of including within his rule were janitors and school bus drivers (*id.* at 22).

Petitioners' claim is that the rule was aimed and applied equally to male and female and to Blacks and whites (*id.* at 6). Yet the rule in its application has only excluded Black females (Tr. 3/16, McCorkle, 44, 45).

The fact that the rule had impact on women only was plainly the result of its design and the method by which it was enforced. Mr. Pettey readily acknowledged that it is "easier to find an unwed mother than an unwed father . . . [b]ecause the unwed mother is stuck with the result" (Tr. 3/16, Pettey, 24). Indeed, at one point in his testimony, he acknowledged that his direction to Ms. McCorkle was to apply the rule to unwed "mothers" (*id.* at 29).

The Court: Mr. Pettey, you do not think the facts or circumstances under which an illegitimate birth occurred is at all relevant to the issue of good character or bad character?

The Witness: No, sir. That would be hard to get at. I think the fact that the birth occurred without the benefit of matrimony is, to me, proof enough of the——

The Court: Is conclusive?

The Witness: Yes, sir." (Tr. 3/16/ , Pettey, 20-21, 28)

[5] "The Court: What about a cafeteria operator, a dietitian?

The Witness [Pettey]: Well, I wouldn't knowingly employ one. An individual who was—had that responsibility of preparing food or any capacity where there was considerable responsibility." (Tr. 3/16, Pettey, 6)

But Mr. Pettey gave no special instructions to Ms. McCorkle as to a method for investigating to identify unwed fathers (*id.* at 25).

Applicants for employment were not asked to disclose whether they were parents of out-of-wedlock children; they were asked only whether they were married and whether they had children. These questions obviously in no way distinguished among single parents who are unwed, divorced, widowed, or have adopted their child. Enforcement of the rule following the filing of the application was the result of informal, personal investigation by Ms. McCorkle, coordinator of elementary education (Tr. 3/16, McCorkle, 6), and Ms. McCorkle in her own testimony explained that she would know that a male had no illegitimate children because "he is married" (Tr. 3/16, McCorkle, 52).[6]

The differential impact of Mr. Pettey's rule as between Blacks and whites was a necessary consequence of both the method of enforcing the rule and the different patterns as between Blacks and whites of surrendering their children for adoption.

The City of Drew has a Black population of 47% (1970 Census of Population, Vol. 1, part 26, "Characteristics of Population, Mississippi," Table 16, U.S. Dept. of Commerce (1973)) and the public school population is approximately 80% Black (Tr. 3/16, Pettey, 27). Statistics prepared by the Mississippi State Board of Health established that in the five year period 1967-71 for every 47 illegitimate children in Sunflower County (in which

[6] Mr. Pettey's testimony, it will be recalled, was to the effect that marriage, even to the other parent of the child, did not cure the impact of unwed parenthood (*supra*, p. 6).

Drew is located) one is white and 46 are Black.[7] Although the ratio of Black to white unwed mothers is very likely not the same as that of Black to white illegitimate children, it is obvious, despite different rates of natality, that there are overwhelmingly more Black than white unwed mothers in that County.

The difference in the impact of Mr. Pettey's rule on the Black and white population is heightened by the further fact that Black women are far more likely to raise out-of-wedlock children than are white unwed mothers, to the extent of a differential ratio of up to 20 to 1.[8] Applying the nationwide adoptability figures for Black and white children, it can be estimated that for every white out-of-wedlock child living with his/her parent in Sunflower County, there are 144 Black children. Given the small number of white out-of-wedlock children residing with a biological parent in the County

[7] The figures prepared by the Mississippi Board of Health, the tabulation of which is set forth below, appear in Exhibit 3 in the record of this case.

Sunflower Co., Mississippi
Illegitimacy by Race

Year	White Live Births	Illegitimate		Non-White Live Births	Illegitimate	
		No.	%		No.	%
1967	178	7	3.9	773	273	35.3
1968	192	7	3.6	802	310	38.6
1969	208	6	2.9	746	291	39
1970	197	5	2.5	716	293	40.9
1971	211	8	3.8	709	316	44.6

[8] "Possibly as many as 70% of all white illegitimate children are given for adoption, but only between 3 and 5% of non-white illegitimate children are adopted." Bureau of Public Assistance, U.S. Dept. of Health, Education & Welfare, *Illegitimacy and its Impact on the Aid to Dependent Children Program*, 35-36 (1960), quoted in H. Krause, *Illegitimacy: Law and Social Policy*, 258-59 (Bobbs-Merrill 1971).

as a whole, it is purely speculative whether one white unwed mother or her child resides in the City of Drew.

The testimony of a defense witness bears out these facts. Ms. Ruby Stancil, lifelong white resident of Drew, indicated that she knew of not one white unwed mother in the City (Tr. 5/31, 104), though the statistics establish that illegitimate births are not unknown to the white community there (*supra*, fn. 7, p. 9).

The combination of the enormous difference between whites and Blacks in illegitimacy rates and the equally dramatic difference patterns of nurturance means that while Black unwed mothers could readily be found by Ms. McCorkle's "investigations", no such unwed white parent was found, or would be likely to be, and that the rule is thus solely directed at Black women.

The Claimed Rationale for the Rule and the Expert Testimony Introduced by Both Respondents and Petitioners

Petitioners' claimed rationale for the rule, as summarized by the District Court, was that 1) the bearing of an illegitimate child, no matter when it took place or under what circumstances, is conclusive proof of parent immorality or bad moral character and therefore is a proper basis for precluding the employment of such person in an educational environment; and 2) the employment of a parent of an illegitimate child in a school may "enhance the likelihood" of schoolgirl pregnancies because of the importance of "'role modeling" and the need for teachers to project a "proper" image to students.

But Mr. Pettey readily admitted that he could show no direct relationship between schoolgirl pregnancies and unwed teachers, and he had no "scientific basis" for his view that unwed mothers who are teachers would "breed unwed schoolgirls" (Tr. 3/16, Pettey, 24). He also admitted

that he had no sociological evidence that the morality of students would be affected by their being taught by an unwed mother (*id.* at 24, 26). Though Mr. Pettey had no proof, studies, data, documents or other evidence supporting his rule, he had a "feeling" that the rule would create a proper moral climate for the minority disadvantaged child and reduce schoolgirl pregnancies (*id.* at 30).

Despite the absence of any problems associated with the four unwed mothers who had been teaching and despite the admitted lack of scientific or other basis at the time of the enunciation of the rule, petitioners at the trial and at depositions sought to sustain their position by opinion testimony of two persons claimed to be experts, as follows:

1) Dr. Benjamin Hal Buchanan, Dean of the School of Education at Delta State University, had held various educational administrative positions within the school system of the State. Without reference to any studies or sociological data, he expressed his opinion that teaching by unwed teachers was harmful because "the psychological makeup of this teacher has been steeped in whatever ethic or code of morality that this teacher subscribes to . . . [and would] have an effect on the teaching effectiveness of the teacher (Tr. 5/31, Buchanan, 38). He acknowledged he had done no studies to justify his opinions (*id.* at 45), nor had he done any studies on unwed mothers as students or teachers (*id.* at 45-46), nor on the impact of unwed motherhood (*id.* at 48-49), and had not studied any items or documents on "the ability of the unwed mother to teach" (*id.* at 49). He noted, however, that unwed parenthood had no effect upon the ability, kindness, or gentleness of an educator (*id.* at 38).

The thrust of his opinion was his statement, "I know that it's morally wrong, according to all of the ethics

that I have ever read and studied, according to the Bible and according to every other background, philosophical way of thinking that I know of" (*id.* at 51). Like Mr. Pettey, he believed that "[n]o matter how it occurred, no matter where, when or how, any person that has a child out of wedlock has a moral or character detriment" (*id.* at 63). But apparently, unlike Mr. Pettey, Dr. Buchanan believed that if an unwed parent "dedicates his life to Christ, the Gospel," he can become "something else", possibly become a minister or teacher (*id.* at 64-65), and indeed "purge himself" (*id.* at 67). Dr. Buchanan had not been aware of the fact that both Ms. Peacock and Ms. Rogers are "deeply involved in their church" (*id.* at 64) and that persons had testified that "they have fine character in their community" (*id.* at 67). He was much impressed by those facts and evidently felt that, whatever their previous conduct, they had the "power to correct all difficulties," "could gain the respect of their community," and could be "extremely effective in anything they did" (*id.* at 75).[9]

Dr. Buchanan was a member of the board of directors of a home for unwed mothers (*id.* at 78), but it was an all-white home (*id.* at 86) and he obviously had little acquaintanceship with the Black community, particularly in the area of unwed parenthood (*id.* at 87).

2) Petitioners place heaviest reliance (Pb pp. 5-9) on the testimony of Dr. Ernest van den Haag, whose

[9] Respondent Peacock's views on the matter of repentance are not dissimilar from Dr. Buchanan's: "Well, it's wrong, but you can go to the altar and repent. The Bible say repent. It's a sin. You can repent for your sin and be forgiven." (Tr. 3/20, 60.) However, she felt quite differently about abortion (which was a way of overcoming Mr. Pettey's rule), which she believes would have brought about eternal damnation (*id.* at 59).

deposition was offered in evidence. He acknowledged that "it is impossible . . . to regulate whether a prospective teacher has extra- or premarital sex" (Dep. 30); he opined that teachers who were unwed parents were improper "'models" for students (*id.* at 11) but he admitted that he knew of no "studies which support [his] point of view" (*id.* at 44, 45) and insisted that "such studies are impossible in the nature of the matter" (*id.* at 46), basing his opinion on his "psychoanalytic experience" (*id.* at 47).[10]

It further developed that Dr. van den Haag's view of the impact of teacher conduct upon students depended upon "the extent to which they are aware of this conduct" (*id.* at 44). Upon being asked to apply his analysis to Drew, he stated "[t]he trouble is I have never been in Drew" (*id.* at 13), and then formulated his entire opinion on an "assumption" that since "we are dealing here . . . with a small town and with a small school," the status of unwed parenthood "would become known to the pupils" (*ibid.*) and "the teacher would be compelled, I would say, to tell the children that it is all right to have children out of wedlock" (*id.* at 17-18). He admitted that if his assumption was incorrect, "if a situation is not known, it would have no effect" (*id.* at 13).

No testimony confirming Dr. van den Haag's assumption appears in the record, despite the fact that of the five

[10] Dr. van den Haag's claimed expertise is not in the field of education. He asserted that he was a psychoanalyst and specialist in sociological psychology (Dep. 3). He has "never attended a school of education" (*id.* at 33) or "received a degree in education" (*ibid.*). He had never taught in elementary school, junior high school, senior high school, or pre-school (*id.* at 35-36).

Respondents in court had objected to the witness's authority to testify as an expert (Tr. 5/31, 118; Dep. 41), and though the lower court reserved decision on this issue, it never ruled on the objection.

persons affected by the rule, four had previously been employed in the Drew school system for varying periods.

The District Court made an express finding that there had been no proof of knowledge by the school children or proselytization on the issue of unwed parenthood by the plaintiffs (Cert. Pet. App. 33). The Court also refused to accept the speculations of the experts that school children would be apt to seek out or infer knowledge of plaintiffs' unwed status (*ibid.*). The Circuit Court agreed with these findings, and stressed the implausibility of children inferring such knowledge, given respondents' residence with their parents and siblings (Cert. Pet. App. 13).

Dr. van den Haag's view that the rule was not sexually discriminatory was based upon a plain misstatement of the rule which counsel for the petitioners strangely supported. The witness stated his understanding of the rule to be that the teacher being employed is asked, "Are you or are you not a parent of a child out of wedlock?", and he contended that either a male or female could answer that question truthfully or could lie (Dep. 31-32). Since he assumed that enforcement was based purely upon the answer to the form, he of course paid no attention to the fact that it was the woman who "is stuck with the result." In fact, there is no question on the form inquiring as to unwed parenthood and the sole basis for enforcement of the rule is Ms. McCorkle's "investigation" (*supra*, p. 8).

Dr. van den Haag's view that the rule was not racially discriminatory was similarly based upon his lack of knowledge of the facts and the community. His statement, "If it's applied equally, I think the chances of a white or black being an unwed parent are about equal" (Dep. 65), is completely at odds with the statistical showing of the

overwhelming differential between Blacks and Whites in this respect in Sunflower County (*supra*, p. 9).[11]

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[11] It appears in the record that Dr. van den Haag is devoted to the idea that Blacks are genetically inferior to whites and indeed is somewhat an ideologue of that point of view as well as of the need to separate races in education. In the course of his deposition he admitted to having written the following:

> "Unequal scholastic opportunity, segregated or otherwise, in no way accounts for unequal achievement." (Dep. 51.)
>
> "The family background of students determines academic achievement. The school does not." (*Ibid.*)
>
> "There is no reason to believe that God ever was an Equalitarian." (*Id.* at 59.)
>
> "[T]he quality of education can be improved for all—only if people are separated according to ability, and this very largely means race" (*Id.* at 56-57).
> 56-57.)
>
> "[T]he quality of education is best and perhaps only improved if pupils are sparated according to their ability, and that, at the present time, ability, as measured by I.Q., does follow racial lines often, at least, on the average." (*Id.* at 57.)
>
> "Instruction in schools for Negroes should attempt to remedy the disadvantages suffered by students coming from a culturally deprived home environment. This cannot be done except by separate education." (*Ibid.*)
>
> "[V]ariance in the measurable intelligence of individuals is largely genetic, and . . . might explain differences in academic performance." (*Id.* at 52.)
>
> "[I]f there is a genetic difference between white and Negro intelligence, the admixture suggests that American Negroes ,though less intelligent than whites." (*Id.* at 59-60.)

Dr. van den Haag explained his theory on this point further, as follows:

> "I believe that one of the attacks against Arthur Jensen's theory was that he tested and relied on the tests made with American Negroes, and that these American Negroes were not racially pure but rather there was about thirty percent mixture of white genes.

[Footnote continued on following page]

The foregoing is the entire expert testimony in support of Mr. Pettey's rule. It should be observed that no testimony was presented to support application of the rule to the numerous classifications of school employees, including "dieticians", to whom the rule applied; that Dr. Buchanan was at odds with Mr. Pettey on the matter of non-repentance; that even Dr. van den Haag seemed surprised that the rule applied even if the unwed parent marries the other parent of the child;[12] and that the role modeling theory was wholly unsupported by proof of knowledge by the students of the unwed parenthood of their teachers, let alone the lack of reference to any studies which demonstrate or even allow inferences that unwed teachers, by their sheer presence in the classroom, would in any way influence the sexual, reproductive, or parental activities of their students.

Respondents presented a series of witnesses of unquestioned expertise in the field of education.

Dr. Edmund Gordon, Professor of Education at Columbia Teacher's College, author of numerous textbooks and articles regarding elementary and secondary education, former research director for the national preschool program Project Headstart, and an ordained Presbyterian

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"Now, I pointed out that since the tests found on the average the measured intelligence—measured to the I.Q., to be between ten and fifteen points below that of whites. Then to indicate that the tested blacks had admixture of thirty percent of white genes, would simply mean that if they didn't have that admixture, the difference between their tested intelligence and that of whites, would have been even wider." (*Id.* at 60-61.)

[12] As he stated in depositions:

"You want to know what I think about the effects of hiring a teacher who has had a child out of wedlock and then marries. Now, you haven't told me whether he or she marries the parent of the child or someone else, or does it matter?" (Dep. 12.)

minister (Dep. 3-8), sought to give some content to the "role modeling" concept:

> "Role modeling is quite specific and there are very, very few situations that I can conceive of where teachers' marital status, parental status or sexual behavior constitutes a target behavior that they are modeling in school.
>
> "The aspects of their behavior that youngsters are much more likely to be influenced by have to do with the relationships between the youngster and the teacher, the way in which the youngster feels about this person's treatment of him or her, the extent to which the youngster sees himself or herself respected by the person.
>
> "Now, if one is arguing that the unwed parent is modeling unwed parenthood, one shall also have to establish the fact that this was, number one, known; number two, that the youngster or youngsters involved were using the teacher as a role model for parenthood or marriage or any one of those attributes." (*Id.* at 12.)
>
> * * * * *
>
> "So, again, the research on the subject would seem to suggest that the most pertinent influence on moral and academic development is the home; that schools can have an influence on the development of specific academic skills, and that they tend to have relatively little impact on the so-called moral development of youngsters." (*Id.* at 25.)

Indeed he said, "we have no evidence that the nature of the school experience makes any difference with respect

to the moral development of youngsters" (*id.* at 24).[13] Addressing the so-called moral implications of Mr. Pettey's rule, Dr. Gordon stated:

> "Morality does not adhere to parenthood. I think morality, if it adheres to any part of the process, adheres to the act of conception.
>
> * * * * *
>
> "But it doesn't sound as if your school district now is setting up sexuality, fornication, as its task, which is the implied basis for the morality. What they are saying is that if you are stupid enough or honest enough or religious enough to bear a child, having conceived it, then you are immoral." (*Id.* at 19.)

Dr. Gordon further questioned how the Drew School District could distinguish between the relative immorality of the unwed mother and the person who, after becoming pregnant out of wedlock, aborts her child (*id.* at 18). He also noted recent studies which indicated that better than 50% of our population is thought to participate in out-of-wedlock intercourse (*id.* at 19). Hence he noted that the sole application of the rule to unwed parenthood, as distinguished from extramarital sexual activity, was inconsistent with the trends of sexual

[13] Dr. Gordon did not identify them, but among the recognized studies directed specifically to this question are Mussen, "Early Sex-Role Development" and Hill and Aldous, "Socialization for Marriage and Parenthood," *Handbook of Socialization Theory and Practice*, Goslin (ed.) (Rand-McNally, 1969); Harrison and Westerman, "An Assessment of Teacher Influence," 48, *The Clearing House*, 223 (Dec. 1973); Jencks, *Inequality: A Reassessment of the Effect of Family and Schooling in America* (Basic Books 1972), reporting that a study of parochial and public school alumni found them to have almost indistinguishable attitudes on most issues, notwithstanding the more explicit moral training experienced by the parochial school children.

activity prevalent within society (*id.* at 20). Dr. Gordon concluded that the rule failed to take into account the many circumstances causing a particular person to become pregnant and bear a child. Hence as a "professor and a psychologist and a minister", he reasoned that judgments of character based solely on childbirth are inappropriate since they ignore the many factors contributing to that result (*id.* at 34).

Dr. Kenneth B. Clark, probably the most outstanding expert in the field of discrimination in education, whose expert testimony was relied upon by this Court in *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954), also testified on behalf of the respondents. He stated:

> "I do not see that unwed parenthood in itself interferes with either the technical academic competence of teachers or the ability of a teacher to communicate to students the genuine acceptance of the humanity of those students or qualities of kindness, sensitivity and love.
>
> "I don't see how unwed parenthood in itself can do that any more than divorce can do it, or separation, or being unmarried.
>
> "I, for my own, do not see where any of these factors operating in terms of themselves can or do in any way influence the effectiveness of the teacher." (Dep. 14-15.)

He made clear that:

> ". . . unwed parenthood for the most part reflects the inability or the lack of knowledge of the—on the part of the female, for the most part, or the male, as to how to avoid unwed parenthood, if it is undesired.
>
> "The evidence is very clear that it has nothing to do with morality, it has nothing to do with sexual

behavior; it has to do only with the degree of sophistication necessary to control this consequence, this particular consequence of heterosexual behavior. (*Id.* at 17-18.)

Dr. Clark expressed his view that it is:

". . . very spurious, [and] misleading [to state that] unwed parents are unable to teach good moral values. . . [A]nyone who says this is either deliberately misleading his audience or is ignorant. There is just absolutely no basis for making that statement." (*Id.* at 19.)

He drew upon his experiences and stated that, except where it is "deliberately imposed" (*id.* at 20), "children are not generally involved [in] or have direct or specific knowledge of the sex lives of their parents, much less their teachers" (*id.* at 20-21). Finally, he confirmed that he did not know of any "educational studies or reports or treatises, or whatever, that show that unwed parenthood has a detrimental effect on students" (*id.* at 23). As to the influence of an unwed parent teacher on schoolgirl pregnancies, he said, "I am sorry, I just can't take that seriously" (*id.* at 25).

Indeed, Dr. Clark saw not only no "positive educational reason or purpose for such a rule" but stated that it is "essentially a punitive rule rather than an educational rule" because of its sex-discriminatory character explaining (*id.* at 10):

"[O]nly the female would be punished or excluded or blocked from participating in an important social process while the male, while technically being as, quote, guilty as the female would nonetheless be unpunished." (*Id.* at 10.)

* * * * *

"[T]he historical reason is that our society does have a long history of discrimination against females on matters of sex and sexual behavior. These rules and regulations are generally made by males, enforced by males, and they would seem for the most part designed to subordinate females to an essentially inferior role, which the power of our society is mobilized to reinforce.

"It is clearly a male dominating approach to human problems and human behavior." (*Id.* at 10-11.)

Finally, he stressed its pervasive stigmatizing effect:

Q. In a community where you have a large number of black children, say, eighty per cent black children in the school district, and you also have a large percentage of children born in that area being born to unwed parents, do you see any detrimental effect that a rule like this could have on, say, black children?

A. . . . [T]he only purpose that I can see for such a rule is a punitive one, that it is a rule that comes out of a history of Puritanistic punitiveness, it comes out of an intentional or unintentional discriminatory punitiveness directed toward females.

It is a dehumanizing rule in that it imposes upon human beings a stigma which to me is absolutely unnecessary, except in terms of cruelty.

It imposes a stigma, an unnecessary stigma, upon the children who are the products of, quotes, the unwed situation of the mother, and it imposes a discriminatory cruelty upon the mother.

I see no other function for such a rule. It certainly has no intrinsic educational function.

> It has no social function. It has, as far as I can see, only a dehumanizing and stigmatizing function. (*Id.* at 26-27.)

Dr. Ronald G. Samuda, Assistant Professor of Education at Columbia Teacher's College, a former high school and elementary school teacher and vice-principal, and author of various educational articles, testified at length concerning the nature of the rule and its impact upon various groups. Initially he noted that the rule illogically infers an unacceptable moral condition from the fact of unwed childbirth (Tr. 3/19, 5): "[H]aving a child is not a moral event, it is a biological and physiological fact. . . But if we say then that a person who cohabits or who has had sexual intercourse, that is to say, premarital sex or extramarital sex, is an immoral person, then we would also be condemning a great majority of the practicing teachers throughout the country who indeed have participated in extramarital sex." (*Ibid.*)

Dr. Samuda stated:

> "The point I want to make here is that the moral value is being placed, in my opinion, in this particular controversy, not upon the fact of childbirth but upon the intermediary between sexuality and childbirth, namely that of contraception or abortion, and therefore, in my opinion, it is an absurd position." (*Id.* at 9.)

In fact, he claimed that the moral values of "black communities are far more rigid than that of the upper middle class" (*id.* at 6), so that the differential application of the rule depended upon whether the teacher "has access to the pill" (*id.* at 32), but had nothing to do with morality (*ibid.*).

Further he noted that the application of the rule would be discriminatory as to Black teachers where Blacks represented a substantially larger proportion of the total

unwed parents within a community (*id.* at 17). Additionally, only women would be the subject of the rule's application because male involvement and identity are extremely difficult to prove or assert (*id.* at 18-19).

The unwed parent could be both a good teacher and proper role model for students, for as Dr. Samuda noted, unwed parenthood was merely evidence of having cohabited once in a lifetime (*id.* at 7). On the issue of role modeling, Dr. Samuda, citing other writers, explained that a prestigious person, engaging in direct, observable conduct or proselytizing such conduct, is engaged in role modeling. In the absence, however, of such direct, observable conduct and proselytizing by a person of some prestige, there can be no role modeling (*id.* at 13).

Additionally, Dr. Samuda described experiments of educators where attempts were made to teach children moral values and he concluded, "the experiments have largely failed" (*id.* at 29). Hence, Dr. Samuda observed, many educational authorities have concluded that such moral values are taught primarily in the home (*ibid.*).

Ms. Fannie Lou Hamer was called and qualified to testify as a sociological expert on the views of Black people in Sunflower County regarding Mr. Pettey's rule and the Black community's feeling pertaining to unwed parenthood (Tr. 3/20, 72, 77). Ms. Hamer, a lifelong resident of Sunflower County, had for years distinguished herself as a community and civil rights activist, particularly in the areas of voting rights and school desegregation. Among her many awards are honorary doctorates of humanities from several educational institutions (*id.* at 71).

In describing the views of Sunflower County Blacks on unwed parenthood, she stated that such behavior was not

encouraged but, on the other hand, it was not "looked down upon" (*id.* at 80). She believed that the community had great respect for those young women who, after bearing children out of wedlock, returned to school to get an education or a better job, or otherwise sought gainful employment to avoid the welfare rolls (*id.* at 80, 102). As an example, she noted that Ms. Peacock had a fine reputation in her community, primarily because of her own effort, and that of older people in the community who helped her, to further her education (*id.* at 90).

Ms. Hamer described community opinion concerning unwed parents by noting that no one in the Black community felt there was anything wrong with unwed mothers teaching in the public schools (*id.* at 82, 91). This view was further supported by her assertion that values were taught in the home and that, as a parent, she molded the moral development of her children, as did other parents (*id.* at 100). She believed that moral values in Sunflower County were taught in the home and not in the classroom (*id.* at 84).

As concerned the scope of the rule, Ms. Hamer believed that if immoral conduct was what the rule was driving at, "[n]obody would teach" (*id.* at 95). The thrust of Ms. Hamer's testimony, however, related to the community-wide view of its effect upon many Black women. She noted that the rule would result in wholesale job loss, particularly among young Black women (*id.* at 80). Consequently, many Black people would be forced on welfare (*ibid.*) or forced, in order to find work, to leave the community in which they were born and raised (*id.* at 97). Further, she personally opposed abortion on religious grounds (*id.* at 82).

Ms. Hamer felt the rule would stigmatize the progeny of unwed parents by "saying to the child that it, too, is not fit" (*id.* at 81). Primarily, however, she saw the

rule as an economic and political method further to castigate Blacks as inferior and further to relegate them to subordinate status, stating:

> "You always tell us, we go through this thing with the welfare or we have got so many kids on the welfare roll, 'Why don't you get up and do something?' And then when we start doing something, 'You don't have any business being that high'" (*id.* at 95-96).[11]

The District Court's Opinion

The District Court fully recognized that "public school officials have the undoubted authority to adopt reasonable employee qualification criteria" but held Mr. Pettey's rule to be defective on two separate grounds:

1) "[T]he policy or practice of barring an otherwise qualified person from being employed, or considered for employment, in the public schools merely because of one's previously having had an illegitimate child has no rational relation to the objectives ostensibly sought to be achieved by the school officials and is fraught with invidious discrimination; thus, it is constitutionally defective under the traditional, and most lenient, standard of equal protection and violative of due process as well." (Cert. et. App. 25).

2) "Alternatively, the policy, both inherently and as applied, constitutes an impermissible, discriminatory classification based upon sex." (*Ibid.*)

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[11] Questioning by petitioners' counsel seemed to confirm Ms. Hamer's statement: "Isn't it a fact that there are not that many black students that plan to be teachers and go to school to be teachers?" (*Id.* at 92.)

The District Court did not reach the issues of race and privacy. On the first point—the lack of rational connection between immorality and unwed parenthood status—the District Court's analysis is clear:

> "The unconstitutional vice of the policy, as understood and enforced by Pettey, is that it conclusively presumes the parent's immorality or bad moral character from the single fact of a child born out of wedlock. By the rule, a parent, whether male or female, who has had such a child, would be forever precluded from employment. Thus, no consideration would be given to the subsequent marriage of the parent or to the length of time elapsed since the illegitimate birth, or to a person's reputation for good character in the community. A person could live an impeccable life, yet be barred as unfit for employment for an event, whether the result of indiscretion or not, occurring at any time in the past. But human experience refutes the dogmatic attitude inherent in such a policy against unwed parents. Can it be said that an engaged woman, who has premarital sex, becomes pregnant, and whose fiance dies or is killed prior to their marriage, is morally depraved for bearing the posthumous child? The rule allows no compassion for the person who has been unwittingly subjected to sexual relations through force, deceptive design or while under the influence of drugs or alcohol, yet chooses to have the child rather than to abort it. The rule makes no distinction between the sexual neophyte and the libertine. In short, the rule leaves no consideration for the multitudinous circumstances under which illegitimate childbirth may occur and which may have little, if any, bearing on the parent's present moral worth. A past biological event like childbirth out of wedlock, even if relevant to the

> issue, may not be controlling; and that it may be considered more conventional or circumspect for the infant to be surrendered to others for upbringing rather than be reared by the natural parent is hardly determinative of the matter. Furthermore, the policy, if based on moral judgment, has inherent if unintended defects or shortcomings. While obviously aimed at discouraging premarital sex relations, the policy's effect is apt to encourage abortion, which is itself staunchly opposed by some on ethical or moral grounds. It totally ignores, as a disqualification, the occurrence of extramarital sex activity, though thought of by many as a more serious basis for moral culpability. Indeed, the superintendent's fiat, altogether unsupported by sociological data, equates the single fact of illegitimate birth with irredeemable moral disease. Such a presumption is not only patently absurd, it is mischievous and prejudicial, requiring those who administer the policy to 'investigate' the parental status of school employees and prospective applicants. Where no stigma may have existed before, such inquisitions by overzealous officialdom can rapidly create it." (Cert. Pet. App. 28-30.)

The District Court found that the conclusive presumption analysis of *Stanley* v. *Illinois*, 405 U.S. 645 (1972), barred a conclusion that all unwed mothers were immoral. The Court said:

> "Granted that many unwed parents may be bereft of morality, and thus unfit for employment in public schools, the policy nonetheless does also bar those persons who, though unwed parents, may have unquestionably good character and high qualifications of job fitness. Since the rule operates arbitrarily and capriciously to prevent certain per-

> sons from receiving employment consideration, it constitutes an invidious discrimination and is violative of equal protection. The fact that the two plaintiffs, Ms. Andrews and Ms. Rogers, were either discharged or not considered for employment, without any inquiry whatsoever into their present good moral character but solely because of the stated policy, constitutes a denial of their due process rights." (Cert. Pet. App. 30-31.)

The District Court did not stop with conclusive presumption analysis, but rejected as lacking in any rational basis the suggestion by the petitioners that teachers with out-of-wedlock children constituted improper models which affected school children's attitudes toward unwed parenthood or a high percentage of schoolgirl pregnancies. The Court said:

> "As a second rationale for their rule, defendants urge that the mere presence of an unwed parent in an educational environment may likely adversely affect the morals of school children and enhance the likelihood of schoolgirl pregnancies. Assuming that libido can be taught in the classroom, there is no evidence that plaintiffs or others were attempting or would have attempted to proselytize students . . .
>
> "Defendants express serious concern about the importance of employee role modeling; that is, they assert it is imperative for teachers as well as other school employees to project a 'proper' image to students of impressionable age. We are compelled to once again emphasize that the record is devoid of evidence of proselytization. In the absence of overt, positive stimuli to which children can relate, we are convinced that the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative. We are not at all persuaded by defendants' suggestions, quite implausible in our view, that students are apt to seek out knowledge of the personal and private family life-styles of teachers or other adults within a school system (i.e., whether they are divorced, separated, happily married or single, etc.), and, when known, will approve of and seek to emulate them." (Cert. Pet. App. 32-33.)

The District Court then established as an alternative ground for its decision the fact that the rule "creates an inherently suspect classification based on sex, i.e., single women, which cannot survive strict scrutiny mandated by the Fourteenth Amendment" (*id* at 33) stating:

> "We note that only unmarried females have been prohibited from employment under the policy; and it is self-evident that the rule can only be applied against them. Although the rule professes to be neutral, proscribing employment of any parent, male or female, of an illegitimate child, the rule cannot operate that way. Unless the man either admits paternity or is so adjudged judicially, it is virtually impossible to prove his involvement. Nature does not readily, if ever, identify the offspring's sire. A woman, however, is impregnated, gives birth, and often raises the child alone. Mr. Pettey freely conceded that mothers of illegitimate children are easier to discover than fathers because, in his words 'the unwed mother is stuck with the result.' Further, although Ms. McCorkle emphatically stated that she would apply the rule equally to both male and female, when asked how she knew that a certain male teacher's aide had not fathered an illegitimate child, she replied, 'because he is married'." (Cert. Pet. App. 34.)

The District Court concluded that "[t]he essentially discriminatory effect of the Drew policy upon unmarried

women is inescapable" (Cert. Pet. App. 36). It found that the policy "cannot survive strict judicial scrutiny" (*id.* at 37).

The Circuit Court's Affirmance

The Circuit Court opinion affirmed the court below by application of only the first of the two alternate grounds of decision—namely, the lack of rational connection between the rule and any legitimate objectives of the School Board. The Circuit Court quoted extensively from the District Court's analysis and likewise rejected the rule as both establishing an impermissible conclusive presumption of immorality and as being devoid of any proven or plausible connection with school children's behavior or attitudes.

Summary of Argument

Mr. Pettey's rule is violative of due process and equal protection of the laws because, even if one were to apply the most minimal standards of review, it bears no rational relationship to a legitimate governmental interest. Analyzed according to its originally stated basis as a test of the "morality" of school employees, it is irrational because the basis of its operation is childbirth and nurturance, obviously not immoral, whereas no penality is visited at all upon pre- or extramarital sexual intercourse, the supposed evil underlying the regulation. Moreover, the ineligibility based on out-of-wedlock parentage is both capricious and irremediable. It takes no account of any of the circumstances of the conception, the lapse of time between the birth and the occasion for applying the rule or the individual's reputation in the community for good character. It permits of no repair of one's condemned status; not even by the subsequent marriage of the offending parents. Nor does the irrationality of the regulation diminish by viewing it as a regulation of the kind of "role-models" that are presented to school

children. Firstly, the regulation was applied to virtually all school personnel regardless of their relationship to students. And if the term "role-modeling" means anything other than "character" then by definition "role-modeling" requires that there be communicated to the school children the status of unwed parenthood as to which both lower courts held there was a complete failure of proof. The argument of the petitioners that the regulation would limit high school pregnancies was, as the Circuit Court said, "without support other than speculation and assertions of opinion." It is an argument which in other contexts has been presented to, and rejected by, this Court, and is designed merely to sustain a punitive, stigmatizing approach to unwed parenthood. Both lower courts made decisive findings of fact on the issues herein and petitioners seek to upset those findings, in violation of this Court's rule that concurrent findings of two courts below are final in the absence of very exceptional showing of error.

Mr. Pettey's rule invades and punishes the Constitutionally protected parent-child relationship in that it places pressure upon a parent to conceal, surrender, or abandon and not nurture a child. The interest of a parent in nurturing a child is an essential and basic right. That right applies to children born out of wedlock equally as to children born within the cloak of matrimony. His rule which excludes the caretaking parent of an out-of-wedlock child from employment is an impermissible burden upon the exercise of the right of nurturance. By barring employment to unwed mothers, the regulation imposes a financial penalty and stigma upon the illegitimate child as part of the economic unit of parent and child, a consequence rejected by this Court in a consistent line of cases.

Mr. Pettey's rule has been applied exclusively to women, and is in fact sex-based. Though men and

women equally share the responsibility for out-of-wedlock births, it is women, not men, who overwhelmingly nurture the illegitimate child. The design of the enforcement mechanism of the rule was such that the rule was applied only to the parent who nurtured the child, which would expectably be the female. No effort was made to ferret out males who sired out-of-wedlock children, and no procedure designed to achieve that was established, though it was self-evident that, absent such procedure, no males would ever be subjected to the regulation. The Pettey rule was thus structured and implemented so as to perpetuate the historic condemnation of only the female in the situation of unwed parentage.

Mr. Pettey's rule constitutes a race-based classification. It in fact has been exclusively applied to Blacks. In the geographical area where the rule is applied, the differential statistics as to white and Black rates of illegitimacy, when combined with the differential ratio of nuturance as between whites and Blacks, has the inevitable consequence that only Blacks and no whites would be affected by the rule. The Court has recognized that where racial disparity is, as here, overwhelming, a neutral appearance and assertions of racial neutrality do not overcome the reality. Moreover, the overwhelmingly disparate application of the rule to Blacks follows because the rule is built upon the effects of past discrimination and the destruction of Black family life which was once mandated and thenceforth perpetuated by law. The impact of the rule is particularly serious because it stigmatizes a high percentage of Black children in the school system. thereby generating the feelings of inferiority which this Court in *Brown* v. *Board of Education* found interfered with the education of Black children.

Finally, the Pettey rule punishes refusal or inability to employ contraception or to abort a fetus thereby

interfering with fundamental rights beyond the power of government. Earlier decisions by this Court recognizing a right to use contraception and to abort a fetus were based upon freedom of choice in areas fundamentally private. Such decisions may not be read as investing local government with the power to pressure resort (or punish non-resort) to abortion and contraception by withholding employment. Petitioners' argument regarding the power of government to protect and advance the institution of marriage ignores a consistent line of decisions establishing that such an interest of government does not permit it to intrude into such deeply personal matters as relate to contraception, abortion, child-bearing and parental rights to nurture children, including those born out-of-wedlock. Nor does it permit discriminatory and punitive treatment of unwed parents or their children as a means of buttressing the institution of marriage.

While the regulation here at issue is invalid by the most minimal standard of review and the most traditional test of rationality, the unusual confluence of right threatened by this regulation—including the rights of nurturance, the right to be free from discrimination on the grounds of race or sex, and the right ot freedom of choice in such matters as contraception and abortion,—requires the use of the strictest standard of review.

In other circumstances involving denial of public employment because of issues as to integrity or immorality or for other reasons which threaten fundamental and protected interests, individualized determination of these factors rather than generic determination is the minimum remedy required. The lower courts properly did not so provide in this case. Finding the rule to be dogmatically overinclusive and invidiously underinclusive and patently irrational, the lower courts set the rule aside as such. Moreover, they expressly prohibited using the content

of the rule—unwed parenthood—as a factor in any due process hearing that might be undertaken because they recognized that such hearings could not cure the basic constitutional defects of the rule and that they would themselves constitute a device and a forum for never-ending stigmatization of Black women and their children.

ARGUMENT

I.

The Pettey rule violates equal protection in that it bears no rational relationship to a legitimate Government interest.

This Court in *Perry* v. *Sinderman*, 408 U.S. 593 (1972), reiterated the settled principle that public employment in the school system may not be denied for reasons that infringe Constitutional interests, regardless of the absence of a claim of contractual right to such employment. See also, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957). Consistent with these cases, the courts below found that Mr. Pettey's rule denied respondents due process and equal protection of the laws on the ground that the rule was totally irrational.

Even in the area of economic and social welfare legislation to which this Court has traditionally accorded the greatest deference, analysis of the conflicting claims of the government to regulate on the one hand and the citizen's assertion of rights on the other proceeds by weighing the governmental interest and the regulatory means employed, and the importance, nature and quality of the rights of the citizen which are affected.

"The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose . . .

. . . Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny . . . The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972).

And see, *e.g.*, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974). And in analyzing the nature of the "fundamental personal rights" entitled to protection, the Court has been particularly sensitive to regulations which discriminate against racial minorities, or are based on sex, or invade the private realm of personal and family life. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Stanley* v. *Illinois*, *supra*.

The rule here at issue which precludes employment of once unwed parents based on the illegitimate status of the child has effects which reach far beyond that of maligning "a person's good name, reputation, honor or

integrity," *Roth, supra*, 408 U.S. at 573,[15] and beyond even the deprivations invalidated in the prior "illegitimacy" decisions of this Court. In this case the classification based on illegitimacy, is wholly irrational and in addition by design and implementation, violates a confluence of four fundamental personal rights and interests consistently accorded the most scrupulous protection by this Court:

(1) It infringes one of the most sacred and private aspects of the family relationship—that between parent and child—by literally conditioning employment on the abandonment of one's child and thereby punishing the maintenance of the parent-child relationship;

(2) It constitutes a sex-based discrimination in that it ignores the father and punishes only the unwed mother who, by virtue not simply of biology but of legally reinforced cultural patterns, bears the responsibility for the care and nurturance of the out-of-wedlock child;

(3) It constitutes a race-based discrimination in that it falls exclusively on Black women and their children, perpetuating the terrible legacy of slavery and discrimination by punishing and stigmatizing illegitimacy; and

(4) By punishing the birth of the child of an unwed union, the rule operates to induce abortions and thereby invades the sphere of reproductive and religious freedom.

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[15] The seriousness of the attack upon the individual teacher's "good name, reputation, honor or integrity" as well as the quality of the interests affected (parenthood and the rights of illegitimate children and their parents versus "mode of dress and appearance") wholly distinguishes the instant case from *Miller* v. *School District No. 167, Cook County*, 495 F. 2d 658 (7th Cir., 1974).

The lower courts found it unnecessary to base their decisions upon the foregoing considerations,[16] because a detailed analysis of Mr. Pettey's rule showed that it could not be sustained upon the most elemental standard of rationality. His rule is simply beyond reason.

Accordingly, we first address an analysis of Mr. Pettey's rule as dealt with by the lower courts, and leave for later sections of this brief the development of the other fundamental, Constitutionally protected rights threatened by the rule.

The alleged "rationale" for Mr. Pettey's rule

The District Court analyzed what appear to have been three separate "rationales" offered by petitioners in support of Mr. Pettey's rule. The detailed examination by the lower courts, as well as an analysis of the record, reveals the complete absence of any rational basis for the rule.

a) *Morality*

Granting "that public school officials have the undoubted authority to adopt reasonable employee qualification criteria (including the possession of good character traits)" (Cert. Pet. App. 25), the District Court demonstrated that this rule had no relation to any such considerations for a series of reasons, including—

i) The rule selected a single fact—a child born out of wedlock—as forever establishing immorality, without regard to:

—The circumstances of the conception;

—Even the subsequent marriage of the couple;- - -

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[16] The District Court did hold, as an alternate ground for its decision, the classification to be sex-based.

—The lapse of time between the birth and the occasion for applying the rule; and

—The community reputation and past or present character or moral worth.[17]

—Classroom teaching history and demonstrated ability.

ii) The rule in fact encourages abortion, "which is staunchly opposed by some on ethical or moral grounds" (Cert. Pet. App. 30) and rewards abandonment (*ibid.*).

iii) The rule totally ignores extramarital sexual activity as a basis for disqualification, conduct thought by many to be "a more serious basis for moral culpability" than a birth (*ibid.*).

In the face of the foregoing analysis, an argument that the rule is related to "character" or "morality" is not only irrational, it is absurd. As a "morality" classification, the rule is demonstrably overinclusive and underinclusive. As the District Court quite properly pointed out, "[h]uman experience refutes the dogmatic attitude inherent in such a policy against unwed parents" (Cert. Pet. App. 29). Even the experts, brought in to bootstrap Mr. Pettey's rule into respectability, could not support his view of the parenting of a child out of wedlock, characterized by the District Court as an "irredeemable[18] moral disease" (*id.* at 30) (*supra*, pp. 12, 16).[19]

[17] Even the petitioners' witness, Dr. Buchanan, seemed to be taken aback that the rule permitted no repentance, which he observed was recogniged within the church (*supra*, p. 12).

Certainly that feature of Mr. Pettey's rule which would not even recognize a subsequent marriage between the parents as curing the effect of the allegedly immoral act takes the rule out of any penumbra of rationality.

Moreover, the rule is invidiously underinclusive. If subsequent marriage cannot cure the fault of unwed parenthood, it is clear, as the District Court recognized (*id.* at 30, 34), that the irredeemably "immoral" conduct is the prior pre- or extramarital sexual act. As a test of morality the rule cannot stand since it singles out single people who nurture their out-of-wedlock children, ignoring all those equally "guilty" who fortuitously or deliberately avoided conception, had an abortion, sired or bore a child of an extramarital union under the cover of matrimony, or abandoned their child. Mr. Justice Jackson's historic words in *Railway Express Agency* v. *New York*, 336 U.S. 106, 112 (1949), quoted recently by this Court in

[18] The Circuit Court noted that this Court had held in *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957), that if a State seeks to impose a burden upon individuals on considerations of character or morality it must look to *present*, not *past*, moral character (Cert. Pet. App. 9).

[19] Testifying on the question of good moral character, Mr. Pettey himself volunteered that a prerequisite to obtaining the teacher's certificate, held by Ms. Peacock and Ms. Barnes, is "that a superintendent or the dean of the school of education or major professor attest to the good moral character of the person applying for that license." (Tr. 3/16, Pettey, 8.) Indeed, Ms. Peacock was an unwed mother at the time she was so certified (Tr. 3/20, 50, 52). Dr. Buchanan testified that, with respect to good character, no inquiry into unwed parenthood status is made of student applicants to Delta State College, nor does the "Teacher Education Council" which prescribes the entry requirements have a policy on the matter (Tr. 5/31, 59-63).

Eisenstadt v. *Baird*, 405 U.S. 438, 454 (1972), are completely appropriate here:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow the officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited upon them if larger numbers were effected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." (Jackson, J., concurring).

We submit that it is irrational to suggest that a rule which encourages abortion—a practice that offends the moral sensibility of a significant segment of American society, *Roe* v. *Wade*, 410 U.S. 113, fns. 22 and 23 (1973)—can be justified on the grounds that it advances morality, at the same time that no action is taken with respect to extramarital sexual activity, the conduct supposedly the target of the regulation. It is further irrational to suggest that morality is determined by a policy that "the infant . . . be surrendered to others for upbringing rather than be reared by the natural parent" (Cert. Pet. App. 30). The rule begins to operate only when a non-marital pregnancy is not aborted. And once the stigma of the rule attahes—upon the birth and non-abandonment of the child—it can never be removed, not even by marriage, which the petitioners purport to exhort.

The lower courts did not reject a power of the local School Board to consider questions of morality. They both concluded, however, that the rule as promulgated

is so unrelated to morality that it simply could not stand up against the most minimum standards of rationality.

Perhaps because of the patent invalidity of their position, petitioners run from their "immorality" argument before this Court. Now they contend:

> "The rule . . . does not operate against the present moral status of an individual school teacher or teacher aide, but operates against the example which such a teacher or teacher aide provides the students in said school district." (Pb. 20)

Petitioners' retreat here echoes that of the school boards' in *Cleveland Board of Education* v. *LaFleur*, where they abandoned earlier asserted grounds based on "outmoded taboos" to support maternity regulations excluding teachers once they "began to show," *supra*, 414 U.S. at 641, n. 9. As Mr. Justice Powell pointed out in his concurring opinion: "The Boards do not advance this today as a legitimate objective, yet its initial primacy casts a shadow over these cases." *Id.* at 653.

b) *Role-modeling*

The second argument pressed by the petitioners is that in some fashion persons who had at one time in their lives become unwed parents were improper "role models" for the students. As the testimony of the rule's progenitor, Mr. Pettey, makes clear, role-modeling is but a sophisticated term for good moral character (*supra*, pp. 5-7). As developed by petitioners, the record affords no basis for any other conclusion.

First, petitioners never explain how this role-modeling theory applies to all those affected by the Pettey rule. Rather, petitioners carefully omitted from their presentation of this case [20] the fact that the rule applies to almost every form of employment in the school system, including not only teachers and teacher aides, but cafeteria operators, dieticians, librarians, gym teachers, secretaries, prin-

cipals, P.T.A. presidents, nurses, social workers, and voluntary workers (*supra*, p. 7). Mr. Pettey's expressed concern appears not to have been with their status as "role-models" but, as he said with respect to dieticians, with their "responsibility of preparing food or any capacity where there was considerable responsibility" (*ibid.* n. 5).

Whatever "role-modeling" means, by definition it requires that there be communicated to the individual who may be influenced by the "model" the fact of the status which is at issue. Unwed parenthood is not an attribute which is visible. Even if parenthood is known, its origins and the relationship of the parents to each other—whether they were ever married or, if so, whether there was a divorce, voluntary separation, desertion, or death—are not matters which are visible or even known to school children unless one of the actors takes steps to make them known. Beyond that, absent communication, it is implausible that the school child will both divine and understand the difference between a child born out of wedlock and one born to a married or once-married parent or adopted by a never-married parent.[21]

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[20] Petitioners' "Questions Presented" characterizes the rule as affecting "teachers and teacher aides" (Pb 2). Throughout their statement of the case and summary of argument, teachers, teacher aides, and persons in instructional positions are mentioned 44 times; no reference there or in any other section of the brief is made to all others excluded by the rule.

[21] The Bureau of the Census reports that 13.4% of all children are living with one parent only, but that only 1.3% are with never-wed parents. Even in the Black population there are five children living with one parent only for every one with a never-married parent. "Family Status of Persons Under 18 Years Old by Presence and Marital Status of Parents, Age and Race: 1970, U.S. Dept. of Commerce, Bureau of the Census, "Subject Reports: Persons by Family Characteristics" (1970). Thus the sheer fact that a parent is not presently married and lives alone with a child provides no basis for inference of illegitimacy. Beyond that, as the record demonstrates, respondents were living in their family homes with parents and siblings (*supra*, p. 5).

Every one of the expert witnesses who referred to "role-modeling" in this case—and this included the petitioners' one witness who dealt with it, Dr. van den Haag—emphasized that communication of status was the necessary prerequisite to any "role-modeling" (see *supra*, p. 13). Without communication of one's status, it becomes impossible to speak of role-modeling; we are then dealing with but another word for "character" or "morality." Petitioners, realizing the lack of viability of their justification supposedly based on "character," have therefore shifted to a new word formula—"role-modeling." The difficulty with their shift, however, is the failure of proof.

The District Court made a finding that (*supra*, p. 28):

> ". . . there is no evidence that plaintiffs or others were attempting or would have attempted to proselytize students. To the contrary, plaintiffs have never attempted to publicize their parental status.
>
> * * * * *
>
> "We are compelled to once again emphasize that the record is devoid of evidence of proselytization. In the absence of overt, *positive stimuli* to which children can relate, we are convinced that the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative." (Emphasis supplied.)

This finding was fully confirmed by the Circuit Court, which added the following comment:

> "The record before us contains no evidence of proselytizing of pupils by the plaintiffs and reveals instead that each plaintiff, along with her illegitimate offspring, is living under the same roof as her parents, brothers and sisters. It would be a wise child indeed who could infer knowledge of either plaintiff's unwed parent status based on the manner of plaintiffs' existence." (Cert. Pet. App. 13).

Petitioners' answer to the foregoing is that they should not be put to the burden of sustaining their contention by any "facts", citing in support *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49 (1973).

Passing for a moment the unusual effort to align the instant case with one dealing with obscenity, it is plain that petitioners have missed the thrust of the decision by this Court. Of course the Court recognizes that in the field of obscenity certain judgments of the State as to the impact of obscenity cannot be established by "conclusive evidence or empirical data" and that the legislature may rely on "the sum of experience," 413 U.S. at 63.

But the deficiency in this case went far beyond that of a lack of scientific studies. The deficiency in this case went to simple, objective, and plainly provable facts, namely, whether the fact of unwed parenthood was communicated to students and whether unwed parents proselytized. It was not the issue of the proof by scientific evidence of the impact of such knowledge or proselytization, but whether there was such. The comparable issue in an obscenity case would be proof as to whether the film was in fact shown, as distinguished from its impact.

It was on this score that the lower courts found the proofs lacking. Despite the fact that four of the five people affected by the rule had a record of prior teaching at the school, petitioners tried to substitute for factual proof of knowledge, understanding, communication, and proselytization, the speculation of Dr. van den Haag (*supra*, p. 13), whose specialty was psychoanalysis and who concededly had no familiarity with the community.

The deficiency in the record is heightened by the fact that petitioners called to the witness stand persons who would have known the facts on this score if they existed

(Mr. Pettey, Ms. McCorkle, Ms. Stancil) and the plaintiffs and at least one of the other affected teachers were on the stand and subject to cross-examination. *No proofs on this point were developed out of any of these witnesses.* The lower courts quite properly concluded that the petitioners should not substitute speculative opinions of experts for provable facts.

Beyond the question of whether there can be role-modeling of parental status without communication, the same irrationality exists under this rubric as under the rubrics of "character" and "morality". Mr. Pettey's rule permitted no repentance, and takes no account of a person's religious affiliation or standing in the community, which even Dr. Buchanan thought to be significant aspects of the "model" somehow projected by the teacher (*supra*, p. 12). Moreover, if married parenthood is the desired role, why does the rule not likewise bar the divorced, separated, or long-widowed parent? How, finally, can that be its purpose if those who marry, and thereby conform their behavior to the desired role, be barred? As with "morality", the defined "model" lacks the most elemental rational relationship to this asserted purpose. See, *Eisenstadt* v. *Baird*, *supra*.

C. *High school pregnancies*

We know no better answer to the assertion of a connection between unwed parenthood of teachers and high school pregnancies than Dr. Kenneth B. Clark's comment:

> "I am sorry, I just can't take that seriously. I think that young girls become pregnant through sexual behavior. They don't become pregnant in a classroom.
>
> "I'm not being facetious. I really think that that is an absurd statement and absurd question." (Dep. 25.)

Indeed, the assertion is so patently absurd that even Mr. Pettey did not make it; he was concerned with providing a "moral climate" (Tr. 3/16, Pettey, 9), and models of achievement to which children could aspire (*id.* at 25), and admitted that he promulgated the rule without any basis in his own experience, in science, or in sociology, causing him to believe any such connection exists (*id.* at 10, 23, 24). Dr. Buchanan never addressed this question, and Dr. van den Haag premised this effect on a tortured construct.[22]

It is no wonder that the Circuit Court likewise rejected as "without support, other than speculation and assertions of opinion" this final rationale "proffered by the school district in hopes of salvaging the Pettey rule" (Cert. Pet. App. 13).[23]

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[22] Dr. van den Haag's testimony, so heavily relied on by petitioners (Pb 7), was that teachers would inevitably communicate their unwed status, and that "even if the teacher feels it [having children out of wedlock] is wrong . . . it would be hard for the teacher to present himself as a repentant sinner, . . . [s]o in effect the teacher would be compelled . . . to tell the children that it is all right to have children out of wedlock" (Dep. 17).

[23] With one exception, every case respondents have found dealing with the issue of exclusions, from employment or schools of unwed pregnant girls or mothers, has invalidated the exclusion either as irrational, see *Perry* v. *Grenada Municipal Separate School District*, 300 F. Supp. 748 (N.D. Miss 1969) and *Shull* v. *Columbus Municipal Separate School District*, 338 F. Supp. 1376. (N.D. Miss. 1972) (unwed pregnant schoolgirls); or as both irrational and an inherently sex-based discrimination, see *Cirino* v. *Walsh*, 321 N.Y.S. 2d 493 (Sup. Ct. Spec. Term, N.Y.Co. 1971) (Puerto Rican mother of eight children denied position as school crossing guard; court also held the exclusion to be racially discriminatory); *Doe* v. *Osteopathic Hospital of Witchita, Inc.*, 333 F. Supp. 1357 (D.Kan. 1971) (unwed pregnant office worker exclusion invalidated under Title VII). And see *Matter of Patricia A.*, 31 N.Y. 2d 83, 88-89, 335 N.Y.S. 2d 33, 37-38 (1972) discussed *infra* p. 63). The exception is *Wardlaw* v. *Austin Independent School District*, appeal pending No. 75-2275 (5th Cir.) (unwed pregnant teacher).

Moreover, it is well known that the status of unwed parenthood is not something which is affirmatively sought but rather imposed by force of circumstance.[24] Primary among the causes of out-of-wedlock birth to teenage girls is the lack of information and realistic understanding about the risks of pregnancy,[25] and the lack of access to effective contraception, which falls heaviest on the poor.[26] Moreover, abortional services are virtually unknown in Mississippi.[27]

Two recent Mississippi statutes indicate that the promotion of increased access of minors to birth control information is an important concern of the State. See, § 41-42-5, *et seq.*, "Mississippi Family Planning Law of 1972" (Miss. Code Ann. 1973). In particular it should be noted that § 41-42-7 gives specific authority to the Drew Public School District to refer students to a physician for the furnishing of contraceptive supplies and information. Clearly a school district seriously interested in reducing out-of-wedlock births could have an effect by exercising this authority rather than by creating spurious teacher exclusions which do not make an iota of difference.

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[24] Cutright, "Illegitimacy: Myths and Causes," 3 Family Planning Perspectives, No. 1, 25, 26 (Jan. 1971). For example, 90% of A.F.D.C. mothers in Cook County defined their children's births as unwanted. Greenleigh & Assoc., Facts, Fallacies & Future: A study of the AFDC Program, Cook Co., Illinois (mimeo N.Y. 1960).

[25] Cutright, *supra*, at 41; Fischman, et al., "Factors Associated with the Decision to Deliver or Abort" (unpub. manu., Family Planning Perspectives Library, 1974).

[26] O.E.O., *Need for Subsidized Family Planning Services: U.S., Each State and County*, pp. 4, 5, 8 (GPO 1969); Cutright, *supra*, at 41-44.

[27] Brody, "National Study Finds Many Unable to Get Abortions in 1974 Despite Supreme Court Easing of Curbs," *New York Times*, 10/7/75, p. 15, col. 1.

Indeed, the complete absence of any basis to connect the supposed objective of reducing illegitimacy with the presence of unwed teachers suggests that the sole objective of the rule was punishment and stigmatization. Petitioners implicitly admit this in their brief, characterizing Pettey as believing "that the influences created by application of this rule would arrest this trend" (Pb 4). This impact was not lost on the lower courts, which recognized that "where no stigma may have existed before . . . inquisitions by overzealous officialdom can rapidly create it" (Cert. Pet. App. 11, 30).

Punishment and stigmatization as a method for reducing illegitimacy has never been sustained by this Court, though it has been repeatedly urged as legitimate. See, *Levy* v. *Louisiana*, 391 U.S. 68, 71-72 (1968); *Glona* v. *American Guaranty & Liability Ins. Co.*, 391 U.S. 73, 75-76 (1968); *Weber* v. *Aetna Casuality & Surety Co.*, 406 U.S. 164, 175-76 (1972); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973). (See *infra*, p. 75).

Essentially petitioners argue that they should be permitted to impose their rule without the most minimal proof of rationality but merely upon their own assertions that it is a method of dealing with the question of illegitimacy. The peroration of their brief argues that:

> "The demise of this policy will cause irreparable damage to this small rural school district and retard if not completely destroy its efforts to 'shape the attitude of young minds toward the society in which they live.'" (Pb 35)

The lower court judges are of course quite familiar with this area of the country and understandably were not moved by such hyperbole. This is precisely the context where the principle, recently reiterated by Mr.

Justice Rehnquist, dissenting in *Keyes* v. *School District No. 1*, 413 U.S. 189, 264, (1973) applies with full force:

> "Indeed, it would be contrary to settled principles for this Court to upset a factual finding sustained by the Court of Appeals. 'A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error.' *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948)."

Yet reversal of the findings below is precisely what petitioners urge upon this Court!

II.

The Pettey rule impermissibly invades and punishes the constitutionally protected parent-child relationship deemed fundamental by this Court.

Mr. Pettey's rule, which permanently bars from most employment in the school district parents of out-of-wedlock children, falls by admission only upon those whose parentage is discoverable through limited investigation. By concealing the existence of one's biological child, by abandoning this child to adoption, foster care, or orphanages, a person escapes the devastating, life-long effect of the rule. It is only those unwed parents who have assumed responsibility for the nurturance, care, and upbringing of their natural children who are denied employment. Thus the rule both threatens and punishes the existence and continuation of this fundamental relationship.

Parent and child are equally victims of the rule whether it operates to induce abandonment or to impose

upon the family unit economic deprivation and stigma based solely on the child's illegitimate status. Moreover, applied to this public school system, Mr. Pettey's rule multiplies the effect on the family unit: it casts the stigma of inferiority upon the substantial proportion of school children who are themselves born out of wedlock.

A. *The Private Relationship Between Parent And Child Ranks As Fundamental In Our Constitutional Scheme Of Values.*

In a long line of decisions this Court has upheld against various forms of governmental intrusion the interest of parents in raising and nurturing their own children, deeming this right "essential," *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1943), and one of the "basic civil rights of [wo]man," *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942) and as "[r]ights far more precious . . . than property rights," *May* v. *Anderson*, 345 U.S. 528, 533 (1953). In *Prince* v. *Massachusetts*, the Court likewise declared that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder," and that "it is in recognition of this (fundamental role and interest of the parent) that these decisions have respected the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944). See also *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). Only where the exercise of parental control or management threatens the welfare of the child, *Prince* v. *Massachusetts*, *supra; Stanley* v. *Illinois*, 405 U.S. 645, 652 (1972), or transcends this private realm to pose a serious hazard to the general welfare, *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905), or to impose its values beyond the home, *Baker* v. *Owen*, 395 F. Supp. 294 (M.D.N. Car.), — U.S. —, 96 S.Ct. 210 (1975), will the exercise of parental control be subject to limitation by the State.

In *Stanley* v. *Illinois*, this Court, drawing upon this historic and settled line of cases, addressed the "fragile and vulnerable" interest which is at stake here, the interest of the parent in the *existence* of the relationship itself. This is an interest even more fundamental than the manner or nature of the exercise of parental control. Like respondents herein, the unwed father in *Stanley* asserted the right to equal recognition and protection of the law for the sacredness of the parent-child relationship "unlegitimized by a marriage ceremony," 405 U.S. at 651. Encompassing this Court's teachings in *Levy* v. *Louisianna*, 391 U.S. 68, 71-72 (1968) and *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U.S. 73, 75-76 (1968), that "familial bonds in such cases were often as warm, enduring and important as those arising within a more formally organized family unit", and that the "test of equal protection should [not] be the legal' rather than the biological relationship", Mr. Justice White declared that:

> "[T]he private interest here, that of a man in the children he has sired and raised undeniably warrants deference and absent a powerful countervailing interest, protection," *supra*, at 405 U.S. at 651.

"The integrity of the (unlegitimized) family unit" he continued, finds its "protection in the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska* . . . the Equal Protection Clause of the Fourteenth Amendment, *Skinner* v. *Connecticut*, . . . (Goldberg, J., concurring)." *Stanley* v. *Illinois*, *ibid.* (citations omitted).

The rule here at issue, unlike that in *Stanley*, does not dictate temporary or final dissolution of the custodial relationship. But it is settled in the decisions of this Court that eligibility for public employment, in the

schools or othewise, may not be conditioned "on a basis that infringes . . . constitutionally protected interests . . . [because] exercise of those freedoms would in effect be penalized and inhibited . . . and [t]his would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L. Ed. 2d 1460." *Perry* v. *Sinderman*, 408 U.S. 593, 597. "Such interference with Constitutional rights," the Court held unanimously "is impermissible." *Ibid.*

Surely the interest in the nurturance of one's natural child commands at least equal Constitutional protection as the First Amendment rights referred to in *Perry*. Indeed, "[o]f this whole 'private realm of family life' it is difficult to imagine what is more private and more intimate" than the relationship between parent and child. Compare, *Griswold* v. *Connecticut*, *supra* at 495 (White, J., concurring), citing *Poe* v. *Ullman*, 367 U.S. 497, 551-552 (1961) (Harlan, J. dissenting). In no other relationship is there a natural bond so deep and irrevocable, is the need and dependency greater or the influence more indelible; no other relationship can or should be so indissoluble.[28]

The Common Law has long recognized the primacy of the bond between biological parent and child, independent

[28] Compare the transitoriness of the marriage relationship. A Census Bureau report indicates that the percentage of marriages ending in early divorce is rising. U.S. Bureau of the Census, Current Population Reports, Series P-20, No. 239, "Marriage; Divorce and Remarriage By Year of Birth 1: June, 1971, (1972), and according to extrapolations, one-fourth of all married women reaching 50 years of age in the 1980's will have had their first marriages end in divorce. *Ibid.* Cited in Babcock, et. al., *Sex Discrimination and the Law: Causes and Remidies*, 677 (Little Brown, 1975).

of a marriage relationship, even against a "more suitable" custodian. As stated so movingly by the Mississippi court:

> "In all civilized countries, in which the family is regarded as the unit of social organization, its minor members must and ought to be subject to the custody and control of those who are immediately responsible for their being, for the reason that by nature there has been implanted in the human heart those seeds of parental and filial affection that will assure to the infant care and protection in the years of its helplessness. . . . The law at the birth of an infant imposes upon the parent the duty of such care and protection, to the performance of which the instincts of nature so readily prompt, and clothes him with the right of custody, that he may perform it effectually upon the harmony with nature, is best for the interest, not only of the parent and child, but also of society." *Hibbette* v. *Baines*, 78 Miss. 695, 704, 29 So. 80 at 81 (1900).

Mr. Pettey's rule accords not sanctity but scorn to this relationship. The ineluctable impact of Mr. Pettey's rule is both to infringe and to punish the fundamental right of nurturance recognized in *Stanley*. The rule puts intolerable pressure on the acknowledgement and maintenance of the relationship between parent and child. The pregnant teenager or young mother is on notice that the cost of caring for her natural child is the abandonment of her aspirations to enter the teaching profession or to work in the school system. The rule would exact an impermissible toll if but one child was denied knowledge of its parentage, separated from its biological parent, or cast out from its parental home to be raised by strangers, be it in a family or institutional context.[28a]

As with the rule in *Stanley*, Mr. Pettey's rule which "explicitly disdains present realities in deference to past formalities, . . . needlessly risks running roughshod over the important interests of both parents and child." *Ibid.* at 657.

B. *The Rule Barring Employment Of Parents Of "Illegitimate" Children Sets Up An Invidious Classfication Which Heaps Deprivation And Stigma Upon Parents And Children Alike.*

The onus of this rule falls upon the child as well as the mother. For the respondents herein, and other unwed mothers who have acknowledged and assumed responsibility for their children, "who have cared for them and nutured them," the rule imposes harsh punishment.

The caretaking parent is denied virtually all employment in the school system. She must therefore give up her professional aspirations and desire to work with children, or she must uproot herself and travel to a distant community.[29] More likely, she is consigned to unemployment or welfare, or relegated to marginal employment, often available only at a distance from her home and child.[30]

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[28] ". . . community disapproval and penal sanctions against the mother may intensify the mother's desire to protect her anonymity and rid herself of the infant. Although the incidence of infanticide and abandonment are not as great as they were in puritan days . . . the pressure on the modern unmarried mother may result either in (illegal) induced abortion or anonymous release of the child for adoption." Foote, Levy and Sanders, *Cases and Materials on Family Law* 118 (Little Brown & Co., 1966).

[29] Dr. Buchanan testified that he had fired unwed parent teachers in his tenure in other school systems (Tr. 5/31, at 54-56); that he would not recommend such a person to be hired (*Id.* at 63).

[30] The impact of this rule is not hypothetical but illustrated herein by the fate of respondents themselves (*supra*, pp. 4-5).

Not only is this rule contrary to federal policy as evidenced in Congressional enactment of the Work Incentive Program,[31] but it serves to perpetuate the cycle of poverty from which these women have struggled so arduously to escape.[32]

The impact of this rule is upon mother and child as a family unit. The denial of employment here is functionally indistinguishable from the ineligibility to sue for wrongful death, to share in disability benefits, social

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[31] The WIN program was initiated in 1970 to encourage parents receiving AFDC to seek outside employment. 42 U.S.C. § 602(a)(19). It's "Statement of Purpose" reads: "The purpose of this part is to require the establishment of a program utilizing all available manpower services, including those authorized under other provisions of law, under which individuals receiving aid to families with dependent children will be furnished incentives, opportunities, and necessary services in order for (1) the employment of such individuals in the regular economy, (2) the training of such individuals for work in the regular economy, and (3) the participation of such individuals in public service employment, thus restoring the families of such individuals to independence and useful roles in their communities. It is expected that the individuals participating in the program established under this part will acquire a sense of dignity, self-worth, and confidence which will flow from being recognized as a wage-earning member of society and that the example of a working adult in these families will have beneficial effects on the children in such families. 42 U.S.C. § 630.

[32] It has been frequently noted that the incidence of illegitimate births tends to fall most heavily on black and poor women. See, generally, Public Health Service, U.S. Dept. of Health, Education and Welfare, *Trends in Illegitimacy in the United States* 1940-1965 (1968). Indeed the causes of unwed parenthood are most often traceable to the low income of the parents. See also *Studies in Public Welfare, Lerman*, "The Family, Poverty and Welfare Programs: Factors Influencing Family Instability," p. 12, prepared for the use of the Joint Economic Committee of the Congress of the United States (GPO 1973) (hereinafter "Lerman").

security benefits and welfare assistance to families of working poor (AFWP) based on the illegitimacy of the child,[33] all of which were struck down by this Court respectively in *Levy* v. *Louisiana, supra, Glona* v. *American Guarantee and Liability Insurance Co., supra; Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972); *Davis* v. *Richardson*, 342 F. Supp. 558 (D. Conn.), aff'd 409 U.S. 1069 (1972); *Griffin* v. *Richardson*, 346 F. Supp. 1226 (D. Md.), aff'd 409 U.S. 1069 (1972); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973); *Jiminez* v. *Weinberger*, — U.S. —, 94 S. Ct. 2496 (1974). Like these "invidious" exclusions, the employment bar at issue visits the condemnation of the nonmarital sexual union ultimately on the child. As Justice Powell stated the principle in *Weber* v. *Aetna Casualty and Surety Co.*:

> But visiting this condemnation on the head of the infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent. *Supra* at 175.

The Court has thus clearly recognized that child and parent are inextricably intertwined in the web of deprivations based on illegitimacy. Even where, as here, the deprivation falls upon the "household" and not the child alone, the Court has refused its sanction. *New Jersey Welfare Rights Organization* v. *Cahill, supra*, as em-

[33] Though articulated as a rule barring unwed parents, it is based entirely on the illegitimacy of the child, since subsequent marriage of the mother does not cure the disability.

phasized at 621-623 (Rehnquist, J., dissenting). Finally, by contrast to every other deprivation invalidated by this Court, the disqualification imposed here is absolutely and universally uncorrectable by the parent, even if, like Ms. Peacock, she subsequently marries. See *Weber* v. *Aetna Casualty and Surety, supra* at 176 (Blackmun, J., concurring); and compare *Stanley* v. *Illinois, supra* at 660 n. 1 (Burger, J., dissenting); *New Jersey Welfare Rights Organization* v. *Cahill, supra;* and cf. *Labine* v. *Vincent*, 401 U.S. 532, at 539 (1971).

The deprivation wreaked upon parent and child by the Pettey rule does not stop with the denial of employment itself. The rule constitutes official legal sanction of the devastating stigma that has been historically attached to the status of illegitimacy.[34] For this Court to sustain the rule would undermine the cardinal principle announced in *Weber* that the law may not lend its authority to such invidious classification. Justice Powell continued:

> "Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to the status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise." *Supra*, at 175-176.

The deprivation and stigma sanctioned by Mr. Pettey's rule do not stop with mother and child. Children born out of wedlock tend to identify with the "blotch" upon their mother and are deeply affected by knowledge of their illegitimacy.[35] In the educational context the stigma cast upon the out-of-wedlock child appears significantly to

[34] Fodor, "Emotional Trauma Resulting From Illegitimate Birth," 54 Archives of Neur. & Psych. 381 (1945).

[35] Davis, "Illegitimacy and the Social Structure," 45 Am.J.Soc. 215, 228, 231-233 (1939).

lower achievement levels.[36] By branding unwed mothers as immoral and unfit to teach or be in proximately to the students, the School District is thus announcing to approximately one-third of the school population (*supra*, pp. 8-10) that their birth and family backgrounds are shameful thereby brandin gthem as inferior to their "legitimate" classmates.

III.

The Pettey rule is, by design and application a sex-based classification which perpetuates the historic condemnation of the unwed mother.

It is the product, not of fortuity, but of design that the five victims of Mr. Pettey's rule are women.

Despite his attempt to maintain semantic neutrality for the rule, Mr. Pettey admitted at the hearing that he had instructed Ms. McCorkle not to hire "unwed mothers" (*supra*, p. 7). Since the policy is an unwritten one, Mr. Pettey's instructions to Ms. McCorkle, who implemented the rule, should be understood by the Court to define the rule, and they demonstrate its facially sex-based character.

Mr. Pettey's admission was not simply an unfortunate "slip of the tongue;" rather, it reflects its sex-discriminatory design and object. Mr. Pettey was well aware of the difficulty of applying his rule to men. He readily agreed that it is "easier to find an unwed mother than an unwed father [b]ecause the unwed mother is stuck with the result" (Tr. 3/16, Pettey, 24). Yet he

[36] Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children," Am. J. Soc. 169 (1969).

implemented his policy in a way which he knew would not touch the unwed father, for despite the greater difficulty of finding unwed fathers, he never advised Ms. McCorkle that she should specially inquire of male applicants whether they have sired illegitimate children, or take any additional steps to ascertain their paternity. (*Ibid.*).

Thus, as understood by the rule's creator, the carefully picked term "unwed parent" is synonymous with "unwed mother." Petitioners' semantic neutrality is but a cover for perpetuating historic discrimination which visits upon the woman alone "society's condemnation" of the non-marital sexual union because she is "stuck with the result." Women are doubly discriminated against by the rule: It is only *their* sexual activity which is punished; and only *their* parentage. It is only they who carry the "scarlet" badge. *Perry* v. *Grenada Municipal School District*, 300 F. Supp. 748, 753 (N.D. Miss., 1969).

Men and women are similarly situated with respect to the act of sexual intercourse that eventuates in the birth of an out-of-wedlock child. "[S]ave artificial insemination, a man . . . is equally the partner of the sexual act" (Cert. Pet. App. 36). Yet this man suffers no consequence for his sexual activity which is at the root of the "immoral" or "improper" status to which the rule is directed. The District Court perceived this sex-discriminatory aspect of the rule:

> "[T]he birth of a child is not an immoral or illicit event, but rather a biological and physiological fact. Thus, the true intent of the rule is, or logically should be, directed to the practice of premarital coitus, of which pregnancy and eventual childbirth is mere evidence. If such be the case, and morality is the true issue . . . the regulation, to be constitutional, must be equally burdensome

against male employees who may participate in such "immoral" acts." (*Id.* at 34; footnote omitted.)

The plain double standard embodied in the challenged policy is firmly rooted in historic attitudes toward unwed mothers:

> [T]he woman with an illegitimate baby . . . was guilty of succumbing to temptation and the man was not to be equally blamed . . . [I]t had been decided that erring women should suffer to the full consequences of a 'fall.'" Dewar, *Orphans of the Living: A Study in Bastardy*, 1968, pp. 20-21.

Likewise, this rule, directed to parentage of an out-of-wedlock child, to be neutral, should fall equally on men and women since "a male who sires an illegitimate child is equally . . . the parent of the child" (Cert. Pet. App. 36). Yet the father of the child escapes the rule's force. As the District Court held:

> "Although the rule professes to be neutral, proscribing employment of any parent, male or female, of an illegitimate child, the rule cannot operate that way. Unless the man either admits paternity or is so adjudged judicially, it is virtually impossible to prove his involvement. Nature does not readily, if ever, identify the offspring's sire." (*Id.* at 34.)

It is not nature alone, but the facility with which the father can conceal his status and abandon the child which excuses him. That most unwed fathers are strangers to their children was acknowledged not only by Mr. Pettey but also by this Court in *Stanley* v. *Illinois*, *supra*, 405 U.S. at 654, n. 6. The Chief Justice cogently characterized the situation in dissent:

> "In almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood." 405 U.S. at 665.

Mr. Pettey's rule absolutely assured its discriminatory impact by the method he chose to enforce it. His reliance on Ms. McCorkle to use techniques of informal investigation confirmed that nothing would be done to reach behind the normal pattern of male abandonment and female nurturance. Any possibility of equal application of the rule was destroyed by its manner of implementation.

Thus, Mr. Pettey's rule, by design and application penalizes the unwed mother who assumes responsibility for the care and nurturance of the child and ignores the abandoning father, effectively rewarding his irresponsibility. Such a policy cannot masquerade as neutrality. If the policy were called what it is—an exclusion of unwed mothers—this Court could not ignore its sex-based nature. Surely the possibility that an unwed father might someday come forward and announce his disqualifying parentage does not cure its inherent defect.

In a series of recent decisions, this Court has begun to undo the ancient legacy of discrimination against women by declaring sex-based classifications to be "arbitrary," and "impermissible." *Reed* v. *Reed*, *supra*; *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Stanton* v. *Stanton*, — U.S. —, 95 S.Ct. 1373 (1975); *Weinberger* v. *Wiesenfeld*, — U.S. —, 95 S.Ct. 1225 (1975); *Taylor* v. *Louisiana*, — U.S. —, 95 S.Ct. 692 (1975).

In each case, some traditional sex-role stereotyped assumption was argued in support of the legislative distinction and was rejected by this Court. Thus the Court has refused to sustain laws which prefer fathers over mothers as administrators of their child's estate, *Reed* v. *Reed, supra,* or which exclude fathers from "widows" benefits under the Social Security program, *Weinberger* v. *Wiesenfeld, supra;* see also, *Phillips* v. *Martin Marietta,* 400 U.S. 542 (1971); or which place different burdens for proving eligibility for spousal benefits on working men and women, *Frontiero* v. *Richardson, supra.* The fault in each of these statutes was that the members of one sex were automatically considered eligible for the rights there asserted without allowing any, or imposing a duty of equal investigation into the eligibility of the counterpart of the opposite sex. Mr. Pettey's rule presents the converse: Women who were once unwed mothers are automatically disqualified without investigation into whether a male applicant or employee shares the same disqualifying feature.

The teaching of these cases cannot be ignored when viewing a rule which falls exclusively on women and heaps upon their already disfavored status, condemnation and deprivation which is premised on a long history of legally reinforced social and cultural discrimination. *Gaston County* v. *United States,* 395 U.S. 285 (1965). This is the first case wherein this Court is squarely presented with the inherently discriminatory impact on women of an illegitimacy classification. Born of the sexual double standard, it is the woman who is condemned. (See Dep. of Dr. Kenneth B. Clark, *supra,* pp. 20-21). By contrast, the law has traditionally shielded the father from financial and social responsibility for his "transgressions" unless he voluntarily assumes it or unless it can be involuntarily imposed in paternity proceedings. See Krause, *Illegitimacy: Law and Social Policy* (Bobbs-Merrill Co., 1971); *Labine* v. *Vincent,* 401 U.S. 532 (1971).

Like the District Court below, the New York Court of Appeals has considered and rejected the double standard concerning responsibility for out-of-wedlock childbirth embodied in New York's age differential for girls and boys considered to be persons in need of supervision (PINS). The court said there is "no rational basis for exempting from the PINS definition, the 16 and 17 year old boy responsible for the girl's pregnancy, or out-of-wedlock birth," *Matter of Patricia A.,* 31 N.Y. 2d 83, 88-89, 335 N.Y.S. 2d 33, 37-38 (1972).

Petitioners in their brief completely ignore this issue and make no articulate reference to it although a few inferential comments should be noted. Petitioners' brief refers to an adult who "voluntarily or by fortune is placed in circumstances which may dictate his or her future" (Pb 11). The District Court, which made a decisive holding on the sex issue as an alternative ground for its decision, rejected this suggestion, referring to this Court's holding in *Frontiero* that a more burdensome treatment of a married woman in the armed forces could not be justified though her assumption of marital vows was no doubt voluntary (Cert. Pet. App. 35-36). Moreover, it is obvious that there is no difference in the voluntariness of sexual intercourse; voluntariness is only in nurturance. If voluntariness in nurturance is a basis for disparate treatment, then those who assume responsibility for their children are punished while those who neglect that responsibility are rewarded.

Similarly the sugestion that disparate treatment may be justified because of heightened "observability" of a status of unwed motherhood as against unwed fatherhood is but another way of building on historic patterns of discrimination against women and again provides a warped and inverted societal response as between those who assume responsibility and those who reject it.

Only in the past few years has the Court begun to undo the work of centuries. See, *e.g.*, *Gomez* v. *Perez*, 409 U.S. 535 (1973); *Stanley* v. *Illinois*, *supra*. But as Mr. Justice Blackmun recognized in *Stanton*, social patterns and sex-role expectations and disabilities, reinenforced by legal sanction, do not die easily and cannot be used to justify continued se-differentiated treatment. 95 S.Ct. at 1378. In this context, no argument of difficulty of equal application to members of both sexes who share the status disability can be heard in defense, because it operates as an engine for perpetuating the derogation of women only. Those arguments have been decisively rejected by this Court as justifications for sex-differential treatment. *Reed* v. *Reed*, *supra*; *Frontiero* v. *Richardson*, *supra*; *Weinberger* v. *Wiesenfeld*, *supra*; *Taylor* v. *Louisiana*, *supra*.

Mr. Pettey's rule, which not only embodies but perpetuates one of the cruelest aspects of the ancient and invidious legal as well as cultural discrimination against women, must be set aside because it punishes women for assuming the responsibility for the care and nurturance of their children, a responsibility which ranks among the interests recognized as fundamental by this Court.

IV.

Mr. Pettey's illegitimacy rule constitutes a race-based classification, built upon the legacy of slavery, and discriminates against Black women and their children.

The "illegitimacy" disqualification here at issue is but a thin veil for racial discrimination. As we have demonstrated above (pp. 8-9), a classification based on illegitimacy in Sunflower County falls exclusively on its Back population. It is not accident that the five victims of Mr.

Pettey's rule are all Black women. That is its necessary and ineluctable effect. The racial fault of the rule lies not in a mere statistical demonstration of its impact but in its design and history, since the rule is superimposed upon the residual consequence of a legal system imposed upon the Black population whose impact has not yet been overcome.

Applying the national Black-white adoption rates to statistics on out-of-wedlock births in Sunflower County as a whole, there will be 144 Black identifiably illegitimate children for every one white child similarly situated. While the differential ratio of Black and white unwed parents may be slightly less, the exclusive impact of the rule on Black unwed parents is a necessary consequence of the population upon which it operates.

Moreover, in view of the overwhelming correlation of race and illegitimacy among the school children stigmatized by the rule, the School District perpetuates the precise evil repudiated by this Court in *Brown* v. *Board of Education*, *supra*, namely, the branding of these Black students with a badge of inferiority. Since the population of the Drew School District is 80% Black and over 40% of those children are born out of wedlock, the stigmatization of Black children by this regulation is massive.

Where racial discrimination is concerned, the Court has made clear that it will not tolerate rules which, though seemingly neutral on their face, have the inevitable and overwhelming effect of excluding or affecting only Blacks. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); where the disparity is overwhelming, a claimed lack of racially discriminatory intent and facial neutrality carry little weight.

The practical cornerstone of this principle is that, where the disparity is overwhelming, consequence, and

not intent, are the test of discrimination, *cf., Palmer* v. *Thompson*, 403 U.S. 217 (1971), and the inherently race-discriminatory nature of a rule and practice is proven through a factual demonstration of impact rather than through a probe of the minds of its creators. *Gomillion* v. *Lightfoot, supra; Gaston County* v. *United States*, 395 U.S. 285 (1969); *Turner* v. *Fouche*, 396 U.S. 346 (1970); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

Where, as here, a rule falls inevitably and exclusively on members of the Black race, this Court has not hesitated to acknowledge its true character. Thus, in *Gomillion*, the Court did not defer to the municipality's seemingly neutral exercise of its virtually absolute power to gerrymander in the face of proof that the only people drawn out of Tuskegee were the Blacks. In light of these facts, the Court held that "*the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration*," that the legislation was designed to exclude Blacks. *Gomillion* v. *Lightfoot, supra*, 364 U.S. at 341 (emphasis supplied). Mr. Justice Frankfurther continued:

> "It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, that, howsoever speciously defined, obviously discriminate against colored citizens.' *The Fifth Amendment nullifies sophisticated as well as simple-minded discrimination.*' *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939) . . ."
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> "While in form this is merely an act redefining metes and bounds, . . . the *inescapable human effect of this essay in geography is to despoil colored citizens and only colored citizens* of their theretofore

> enjoyed voting rights." *Supra* at 347 (emphasis supplied).

Racial discrimination is established by statistical demonstration in other contexts as well. In *Turner* v. *Fouche*, *supra*, the fact that 96% of persons eliminated as potential jurors by jury commissioners as "unintelligent" and "not upright," 396 U.S. at 358, established *prima facie* proof of racial discrimination.

Here, as in *Gomillion*, the rule which excludes only mothers who rear their out-of-wedlock children is in fact synonymous with non-application to the white population and exclusive application to the Black population.[37]

Echoing these Constitutional holdings in the Title VII context, Mr. Justice Burger made clear that a demonstration of even a less than total racially disparate impact of a facially neutral employment condition establishes its racial character:

> "'[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds" for minority groups and are unrelated

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[37] The overwhelming racial impact of this rule distinguishes this case from *Jefferson* v. *Hackney*, 406 U.S. 535, reh. denied, 409 U.S. 898 (1972), where the racial disparity was far less substantial. Even should this Court treat the illegitimacy exclusion here as establishing a less than overwhelming racial disparity, however, the Pettey rule, operating as it does in the employment context (see note 38, infra, p. 68), is not owed the deference this Court has traditionally accorded legislation involving distribution of social welfare benefits, as in *Jefferson*. Similarly, *James* v. *Valtiera*, 402 U.S. 137 (1971), in no way affects the force of *Gomillion* for in *James* the claimed racial impact was not established and the thrust of the disparity was in economic differentials which crossed racial lines.

to measuring job capability.' *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971)".[38]

Moreover, the Court has also treated as if facially impermissible, neutral rules or devices which, because they are built upon the effects of past discrimination, must logically result in disproportionate racial exclusion. The historic maintenance of a dual school system, *Brown* v. *Board of Education, supra*, precluded the validation of a school system now seemingly neutral but emerging from the "root and branch of discrimination." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971); *Keyes* v. *School District No. 1*, 413 U.S. 189, 200 (1973). And the collateral consequences of past discrimination equally prevent approval of seemingly neutral tests which in fact perpetuate it in other forms. *Gaston County* v. *United States, supra*, 395 U.S. at 291, 293, holding that Blacks who had received inferior education under a racially segregated educational system would be necessarily discriminatorily affected by the use of a literacy test. See also, *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939); *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 429.[39]

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[38] Because of the overwhelming impact on Blacks here and the combination of employment and fundamental rights, respondents deem it unnecessary to enter the controversy concerning whether the strict Title VII standards should be applied to neutral employment conditions in the Fourteenth Amendment context. Compare, *e.g.*, *Davis* v. *Washington*, 512 F.2d 956 (D.D.C. 1975), *cert. granted*, — U.S. — 44 U.S.L.W. 3179 (No. 74-1492, Oct. 7, 1975), with *Tyler* v. *Vickery*, 517 F.2d 1089, 1098 (5th Cir., 1975). It is clear that a heightened standard of review is nonetheless applied, *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2d Cir., 1972); *Armstead* v. *Starkville Municipal Separate School*, 461 F.2d 276 (5th Cir., 1972), relied on in *Tyler* v. *Vickery, supra*, at 1101.

[39] The historic pattern of voter discrimination against minorities similarly underlies the Congressional requirement that voter lists be automatically supplemented for jury selection purposes where they fail to yield a representative sample. 28 U.S.C. § 1863(b)(2). See Brief of Solicitor General, *Test* v. *United States*, — U.S. —, 94 S. Ct. 749 (1975).

The classification based on illegitimacy falls upon Black people as part of the legacy not only of discrimination but of the legalization of slavery itself. It was the deliberate conscious policy of the slaveholder to disrupt and prevent marriage and cohesiveness among Blacks since that would have interfered with the breeding of strong workers for sale,[40] and while more than a century has passed since the formal termination of the legal status of slavery, other governmental programs have perpetuated this centrifugal pressure on poor, largely Black families. "In the case of A.F.D.C., the family splitting incentive is well known. Poor families are not generally eligible for A.F.D.C. benefits unless one natural parent is absent . . . [which] encourages parents not to marry, to separate, and to avoid remarriage".[41]

In Sunflower County the maintenance of a stigmatized, deprived, and isolated Black population has continued until very recent history. After all, it was only in 1969—15 years after *Brown*—that the schools of Drew were desegregated and then only by court order (District Court opinion, Cert. Pet. App. 23).[42] And in 1966 an

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[40] Franklin, *From Slavery to Freedom*, 201-204 (Knopf 2d ed 1960), Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*, 930, 931 (Harper and Bros., 1944). "Marriage", therefore, was often temporary and a matter of declaration, and could not constitute the exclusive context for sexual relations and childbearing. *Id.* at 935. The less formalized Black family structure that emerged as a response to slavery was viewed by Myrdal as a healthy social adjustment to extreme adversity. *Ibid.*

[41] Lerman, *supra* n. 28. *Cf.*, *King* v. *Smith*, 392 U.S. 309 (1968); *Lewis* v. *Martin*, 397 U.S. 552 (1970).

[42] Just prior to his tenure at Drew, Mr. Pettey himself was adjudged liable for perpetuating racial segregation in the Tunica County school system by paying from school funds salaries to white teachers refusing reassignment to integrated schools in accordance with a prior court order and by allowing use of public school property in private schools after the desegregation order. *United States* v. *Tunica County School District*, 323 F. Supp. 1019 (N.D. Miss., 1970).

election of municipal officials in that County had to be set aside because of exclusion of Blacks from the voting prcess. *Hamer* v. *Campbell*, 358 F.2d 215 (5th Cir., 1966), *cert. den.*, 385 U.S. 851 (1966).

Mr. Pettey's rule cannot be separated from its roots in the most vicious legal discrimination imaginable. It punishes in the name of morality illegitimacy and matriarchy which are fundamentally postive survival mechanisms: ". . . The mother-centered family with its emphasis on the primacy of the mother-child relation and only tenuous ties to a man, then, is the legacy of adaptations . . . worked out during slavery". Rainwater, "Crucible of Identity" in *Daedalus*, 172, 179 (Winter 1960). As with the literacy test in *Gaston*, the race-discriminatory character of Mr. Pettey's rule is not only logically inferrable from the history of discrimination, *supra* 395 U.S. at 295; it is inherently impermissible in that, even if " '[i]mpartial administration' " were possible, the rule "would serve only to perpetuate these inequities in a different form." *Id.* at 297.

To permit this illegitimacy classification to stand would invite its adoption in a broad range of public and private employment contexts as a convenient pretext for racial discrimination and for stigmatization of the Black community.

The singular impact of this rule on Black people, in the context of an "educational system," cannot be read as anything other than "an official expression of inferiority towards black citizens," *Palmer* v. *Thompson*, *supra*, 403 U.S. at 229 (Blackmun, *J.*, concurring).

In a remarkable *tour de force*, petitioners seek to turn the facts in this case on their head. They argue that in invalidating this regulation the lower courts have supported the protection of separate "moral values" of the

Black community; that respondents are at odds with *Brown* v. *Board of Education* and that in essence respondents are saying, "You must recognize two cultures in your community and accommodate them both." With much nautical language, petitioners argue that we "set sail" upon a collision course with prior decisions of this Court (Pb 34).

Respondents, quite to the contrary, seek the fullest implementation of *Brown* v. *Board of Education*. They seek to strike down Mr. Pettey's rule for many reasons, including that it gives the "sanction of the law" to the deprecation of the Black community; it 'generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone" and affects "the motivation of a child to learn," *Brown*, 347 U.S. at 494. See, *Jenkins*, *supra*, n. 36. As the District Court, sensitive to the local history and conditions, so cogently observed:

> "Where no stigma may have existed before, such inquisitions by overzealous officialdom can rapidly create it." (Cert. Pet. App. 30.)

This is, of course, not the first time that a litigant before this Court, having engaged in racial discrimination, presents itself as the champion of equality and "color-blindness," *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968).

V.

The preclusion of employment under the Pettey rule punishes refusal or inability to use contraception or to have an abortion thereby intruding into a realm of privacy and liberty insulated from Government regulation.

This Court's recognition of the fundamental right of the individual married or single to control childbearing through contraception or election of abortion, *Roe* v. *Wade, supra; Eisenstadt* v. *Baird*, 405 U.S. 438; *Griswold* v. *Connecticut, supra*, does not sanction governmentally imposed coercion to employ these methods to prevent childbirth. Rather, the freedom protected by the Constitution is the right "to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision *whether* to bear or beget a child." *Cleveland Board of Education* v. *LaFleur, supra* 414 U.S. at 639, citing *Eisenstadt* v. *Baird, supra* 405 U.S. at 453.

Justice Goldberg made this principle clear in his concurring opinion in *Griswold*:

> While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is a complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control would seem to be valid. 381 U.S. at 497.

The rule here at issue has precisely this forbidden impact. Employability in the school system is conditioned first upon the effective use of contraception, which is singularly unavailable to young poor women (see *supra* n. 26).

Studies of pregnant teenagers illustrate that pregnancy is frequently the result of inadequate information concerning conception and contraception (*supra* n. 25). The rule thus punishes the poor and misinformed, not the sexual conduct itself. As Ms. Peacock stated in her testimony:

> During the time I became pregnant, as you say, black people wasn't aware of the many things that the white person would use in order to keep from getting pregnant. So if I had had all this counseling like, you know, maybe a parent that knew more about this, as a white person did, then I would say no, I wouldn't become pregnant at that time and no other time." (Tr. 3/20 63).

Lacking adequate contraceptive advice, pregnancy is expectable and abortion is the next possible route to employability under Pettey's rule. But, as with contraception, abortion is far less accessible to and understood by the young and the poor. Indeed, as to the five women victimized by Pettey's rule, legal abortion was absolutely precluded at the time of the births. But even though a legal abortion is now hypothetically available (*supra*, text at n. 27), this Court did not, by recognizing a woman's fundamental right to choose abortion, invest local governments with the power to dictate or pressure that choice by conditioning employment upon a willingness and ability to avoid pregnancy by effective contraception or to terminate a pregnancy by abortion. Indeed, in *Cleveland Board of Education* v. *LaFleur, supra*, this Court refused to sustain a significant, but far less weighty, pressure on the right to procreate than effected here by the permanent bar to teaching employment.

Writing this Court's landmark decision in *Roe* v. *Wade, supra*, Justice Blackman recognized the deep controversy that surrounds the question of abortion. Abortion is viewed by some people in this society as a completely impermissible alternative to unwed parenthood. Ms. Peacock expressed her own conscientious objection:

> "God put us here on earth and if it came up to that I feel that we should have them, you know. If we try to get rid of it, as most people do, that's killing it. Well, you know where we would wind up then." (Tr. 3/30 39).

To condition employment on the decision to abort not only repudiates the freedom of personal choice that is the hallmark of reproductive liberty recognized by this Court; it also infringes the free exercise of religion explicitly protected by the First Amendment. *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

Petitioner's argument (Pb. Pont I, pp. 12-15) that this rule, punishing the parent and offspring of a non-marital sexual union is justified as a measure to pressure and encourage marriage is founded on a total distortion of the teachings of this Court.

Without minimizing the state's interest in regulating the institution of marriage, see e.g. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Sosna* v. *Iowa*, — U.S. —, 95 S. Ct. 553 (1975), of which the outlawing of bigamy is a part, this Court has made clear that there are certain aspects of private consensual sexual relations, including the use of contraception, access to abortion and the right to custody of one's biological though out-of-wedlock children that are beyond the reach of the State. *Eisenstadt* v. *Baird, supra; Roe* v. *Wade, supra; Stanley* v. *Illinois, supra.* Petitioners completely ignore this Court's holding in *Eisenstadt* that the right of "decision whether to bear or abort a child" belongs to the "*individual*", married or

single. *Supra* at 453; they torture the subsequent decision in *Roe* v. *Wade, supra* into affording protection to "certain activities relating to marriage" notwithstanding that plaintiff Roe was herself a single woman, *supra* at 712; and they make no mention of this Court's teaching in *Stanley* v. *Illinois, supra*, that the "rights to conceive and raise one's children" recognized in *Meyer* v. *Nebraska, supra* and *Skinner* v. *Oklahoma, supra*, are not confined to a ceremonialized marriage relationship. Nor do they mention Justice Powell's words in *San Antonio Independent School District* v. *Rodriguez* that "[i]mplicit in the Court's opinion [in *Skinner*] is the recognition that the right of procreation is among the rights of *personal* privacy protected under the Constitution." 411 U.S. 1, 34, 42-43, n. 76. (emphasis supplied). All these cases make clear that none of these fundamentally private activities can be interferred with in an effort to punish or deter non-marital sexual or family unions.

Finally, they deliberately ignore the entire line of cases in this Court which has rejected repeated arguments that punishment of illegitimacy is a permissible means to promoting the institution of marriage. See *Levy* v. *Louisiana, supra; Glona* v. *American Casualty and Surety Co., supra; Weber* v. *Aetna, supra.* They ignore that, most recently, in *New Jersey Welfare Rights Organization* v. *Cahill, supra*, the Court passed over the contention that an incentive scheme which denied benefits to households consisting of two unmarried adults and a non-adopted child would promote a legitimate state interest in assuring stability because it encouraged the formalization of non-martial and parent-child relationships. Of this whole line of cses they cite only *Labine* v. *Vincent, supra*, which had to do not with the regulation of sexual conduct or procreation, but with the regulation of land titles and the descent of property.

VI.

The confluence of fundamental protected rights and interests here requires that the Pettey rule be tested by the strictest standard of review.

As we have discussed in Point I, *supra*, there is no need to test the Petty rule by any but the minimal standard of review applied in the Equal Protection context, so lacking is it in any rational connection to a legitimate state interest.

The unusual confluence of fundamental rights and interests here, detailed in Points II, III, and IV, and V mandates, however, that the Court test the rule by the most stringent standard of review.

In a consistent line of cases, this Court has recognized that governmental conditions on employment which threaten, infringe or punish the exercise of fundamental rights will be accorded the same careful scrutiny accorded direct infringements on those rights. *Perry* v. *Sinderman, supra; Pickering* v. *Board of Education, supra; Keyishian* v. *Board of Regents, supra; Sherbert* v. *Verner, supra.*

Regulations impinging upon such vital and "sensitive areas of liberty" will not be sustained except upon a showing of a legitimate compelling and overriding state interest, and that the means employed are necessary and closely tailored to achieve the stated purpose. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1961); *San Antonio Independent School District* v. *Rodriguez, supra.*

The rights at stake here are unquestionably among the most basic human rights "implicit in the concept of ordered liberty" *Palko* v. *Connecticut*, 302 U.S. 319 (1937) and "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder*

v. *Massachusetts*, 291 U.S. 97 (1934). *Meyer* v. *Nebraska, supra; Sherbert* v. *Verner, supra; Skinner* v. *Oklahoma, supra; Griswold* v. *Connecticut, supra; Stanley* v. *Illinois, supra; Roe* v. *Wade, supra; San Antonio Independent School District* v. *Rodriguez, supra.*

Moreover, where the regulation, as here, invades the fundamental rights of historically discriminated against racial minorities and women, the heightened scrutiny normally accorded such discriminatory classification is more rigorous still. *Gomillion* v. *Lightfoot, supra; Gaston County* v. *United States, supra; Hunter* v. *Erickson*, 393 U.S. 385 (1969); *McLaughlin* v. *Florida*, 374 U.S. 184 (1965); *Loving* v. *Virginia*, 388 U.S. 1 (1969); *Reed* v. *Reed, supra; Frontiero* v. *Richardson, supra; Taylor* v. *Louisiana, supra.*

The litany of strict scrutiny in decisions invalidating illegitimacy classifications, characterized repeatedly as "invidious", "illogical and unjust", see *Weber* v. *Aetna Casualty and Insurance Co., supra*, merits concretization in this case given manifold violations of the Constitution accomplished by the Pettey rule.

A rule which could not, in the concurrent judgment of the lower courts, meet the minimal test of rationality can hardly survive the strict scrutiny which its deep incursions into constitutionally protected rights and liberties require.

VII

The lower courts properly invalidated the pettey rule *in toto* and did not, as petitioners' suggest, call for individualized hearings.

The foregoing discussion demonstrates the overwhelmingly irrational, invidious and impermissible nature of the Pettey rule.

Petitioners misread the lower court opinions, however, characterizing them as having "opted for the position that an individual who seeks employment with the defendant school district should be given a due process hearing" (Pb. 20). This ignores the actual rulings, which were that the fact of unwed parenthood status is simply not relevant to teacher qualification.

Though both lower courts held that immorality or unfitness could not be presumed from the fact of unwed parenthood, they went beyond invalidating the *process* by which the Pettey rule operates. They invalidated as a matter of equal protection and due process, not the procedure but the very *permissibility* of this criterion of eligibility.

Cataloguing its evils, the lower courts found the rule to be not only absurdly and dogmatically overinclusive, but also to be invidiously underinclusive, ignoring pre— and extra-marital sexual activity; and they noted as well its incentive to abortion or child-abandonment; they also made decisive holdings as to the lack of any rational nexus to teacher qualification, role, or function. On these bases, they invalidated the criterion completely.

The "Judgment" of the District Court, affirmed *in toto* by the Circuit makes this unmistakeably clear.[43] In

[43] The "Ordered" portion of the judgment states as follows:

(1) The policy and practice in the Drew Municipal Separate School District against hiring unwed parents in the public schools is declared to be *null and void*, as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution; and the defendants, their agents, and employees are *permanently enjoined from applying said policy directly or indirectly in the employment or discharge of school employees.*

[Footnote continued on following page]

particular, the *Judgment prohibits as to each respondent consideration of her "status as an unwed parent" as a factor of any relevance whatsoever to her eligibility* for a teaching position. Finally, far from inviting due process hearings, the District Court clearly recognized that petitioners might themselves seek to employ a hearing format to do by indirection what they were enjoined from doing directly. Thus the District Court erected around respon-

(2) The plaintiff, Ms. Lestine Rogers, be and she is hereby reinstated as teacher's aide in defendants' schools and adjudged entitled to recover monthly compensation of $250 for the 1972-73 school year, less any earnings she may have received in other employment since the date of her discharge. Said plaintiff, if she so desires, is entitled to be continued in the position of teacher's aide for the 1973-74 school year, except for good cause or *reasons unrelated to plaintiff's status as an unwed parent,* found to exist after according her a full and adequate due process hearing.

(3) The plaintiff, Ms. Katie Mae Andrews, who would have been hired as a teacher's aide except for the unconstitutional policy, is awarded damages at the rate of $450 per month for the months embraced within the second semester of the 1972-73 school year, less any earnings she may have received in other employment during said period of time. The said plaintiff, if she wishes, shall be employed by defendants for the school year 1973-74 except for good cause or *reasons unrelated to her status as an unwed parent,* found to exist after a full and adequate due process hearing.

(4) In the event due process hearings are held pursuant to either of the preceding paragraphs 2 and 3, defendants shall at their cost provide a complete a transcript of the evidence relating to the reason or reasons for not employing either or both of the named plaintiffs as teacher's aides for the forthcoming school year, with a statement of defendants' findings and decision thereon. The court shall, at the request of any party, review such record and findings and enter judgment approving, reversing or modifying the defendant's decision as may be proper.

The court retains continuing jurisdiction to issue such further and supplementary orders as may be necessary to effectuate this Judgment in accordance with the Memorandum Opinion filed herein. (Emphasis supplied).

dents 'declared right to employment irrespective of their unwed parent status, a series of procedural safeguards designed to prevent circumvention of the Court's injunction and jurisdiction (*supra*, n. 43).

We agree with the lower courts that the invidious irrationality of the rule renders procedural due process an inappropriate and inadequate remedy in this case.

It is not that the essential prerequisites to individualized rather than categorical or presumptive treatment under the Fourteenth Amendment are lacking here. Quite the contrary: The conclusiveness of the presumption is absurd and unsupported by petitioners' own record (*supra*, Point I); indeed they themselves concede that unwed parent status does not "separate the moral from the immoral in litmus paper fashion" (Pb. 4). Moreover the confluence of basic human and constitutional rights and interests affected by the rule is virtually unprecedented and calls for close scrutiny. See, e.g. *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Stanley* v. *Illinois*, *supra*; *Reed* v. *Reed*, *supra*; *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Cleveland Board of Education* v. *LaFleur*, *supra*; and *cf. Salfi* v. *Weinberger*, — U.S. —, 95 S.Ct. 2457, 2470 (1970); see also *Board of Regents* v. *Roth*, *supra*. Finally, there can be absolutely no issue here of administrative inconvenience as suggested by petitioners (Pb. 20).[44] *Cf. Salfi* v. *Weinberger*, *supra*.

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[44] It is hard to see how an individual determination could have that effect where the record is clear that the entire process of hiring and retention of teachers is an individualized one.

Petitioners' argument is thus far less cogent than the contentions of other school boards which failed to avoid the Constitutional command of due process even where it required *institution* of special procedures for individualized determination. *Baker* v. *Owen*, *supra*, 395 F. Supp. at 301-303; *Goss* v. *Lopez*, 419 U.S. 565 (1975); *Cleveland Board of Education* v. *LaFleur*, *supra*.

The question is thus not whether the requisite elements for invalidating a conclusive presumption have been established; it is rather whether a decision grounded on process would be, in this case, even minimally adequate to cure the manifold constitutional defects of the rule.

The District Court, particularly sensitive to the local conditions, framed its judgment out of its realistic and logical concern that procedural due process could become a device and forum for never-ending stigmatization of Black women and their children, and the Circuit affirmed.

The lower courts effectively recognized that procedural due process simply would not remedy the inherent defects of a rule so fundamentally invidious and irrational; it would not cure or address the rule's sex—and race—discriminatory character as only Black women would be singled out for inquisition and hearing; nor would the prospect of hearings and character investigations cure or address the rule's encouragement of abortion or abandonment of one's biological child or its punitive implications for mother and child.

In sum, the lower courts recognized that procedural due process, with its "investigations" and "inquisitions by overzealous officialdom." (Cert. Pet. App. 11, 30), would serve only to create and perpetuate the very stigma which is impermissibly and spuriously imposed by the rule itself. It is for these reasons that they concurred in holding the presumption embodied in the rule to be "not only patently absurd", but also "mischievous and prejudicial" (*id.* at 11, 30), and in disallowing any consideration of unwed parenthood status as a criterion for teaching. Comp. *Stanley* v. *Illinois*, *supra*.

For all these reasons, Respondents submit that the guarantee of procedural due process and individual determination, otherwise appropriate where conclusive presumptions needlessly invade important or fundamental rights, would not remedy the fundamental discrimination herein.

CONCLUSION

Whereas Respondents have demonstrated that the Pettey rule cannot survive the minimal test of rationality, we urge the Court to explicitly recognize, as the Circuit Court declined to do, the panoply of fundamental constitutional rights and interests violated by this rule, if others are not to suffer, by evasion or device, the deprivation and stigmatization already suffered by Respondents, their children and the Black community of Drew.

WHEREFORE, the decisions of the lower courts should be affirmed.

Respectfully submitted,

Dated:
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No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, et al.,
Petitioners,

—v.—

KATIE MAE ANDREWS, et al.,
Respondents.

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RESPONDENTS' SUPPLEMENTAL BRIEF PURSUANT TO RULE 42(5)

Point IV of our brief (p. 64) argues that Mr. Pettey's illegitimacy rule is a race-based classification which is built upon the legacy of slavery, and which discriminates against Black women and their children. We pointed out that the rule has its impact exclusively on Black women and that such impact was its necessary and ineluctable effect. We also demonstrated that the racial impact of the rule was not a matter of accident but rather of design.

Following the submission of our brief, some facts were called to the attention of counsel which we believe sharpen the foregoing presentation.

It will be recalled that on May 28, 1969, the Drew Municipal School District was ordered desegregated by a United States District Court Order (Respondents' Brief, p. 3), *Carter* v. *Drew Municipal Separate School Dis-*

trict, Civil Action No. GC 6731-3, N.D. Miss., and that Mr. Pettey promulgated his rule two years later.

On August 17, 1973, plaintiffs in the foregoing desegregation suit against the School District filed a Motion for Supplemental Relief and for Contempt Judgment challenging as racially discriminatory defendants' policies and practices relating to faculty discharges and recruitment. Following the filing of that motion and the inspection of documents, plaintiffs on May 13, 1974, filed a comprehensive set of Requests for Admission, in response to which defendants on June 19, 1974, filed Answers which included the following:

> The number of full-time teachers, by race, employed by the Drew Municipal Separate School District for each school year, 1968-69 through the present is as follows:

	White	*Black*	*Total*	*% Black*	*% White*
1968-69	35	71	106	67%	33%
1969-70	33	68	101	67%	33%
1970-71	28	53	81	65%	35%
1971-72	32	46	78	59%	41%
1972-73	37	37	74	50%	50%
1973-74	46	35	75	47%	53%

The District Court's order in *Carter* relating to faculty desegregation was not entered until March 18, 1970, and required total faculty desegregation beginning with the 1970-71 school year. From that point forward, as defendant's statistics demonstrate, the ranks of black faculty were decimated while white faculty increased. In the year Mr. Pettey promulgated the policy herein at issue (1971-72), the second year that the School District was subject to the faculty desegregation order defendants increased the number of white teachers in their employ by four, while reducing the number of black teachers

by seven. By 1973-74, white faculty had increased by 31% (from 35 to 46) and black faculty had decreased by 51% (from 71 to 35).

Furthermore, annual "Reports to the Court" required by its desegregation order to be filed by the Drew School District establish that with respect to *elementary school teachers* the reduction in the percentage of black teachers and the increase in the percentage of white teachers is even more dramatic:

> Elementary Teachers, by Race, Employed by the Drew Municipal Separate School District for Each School Year, 1968-69 Through the Present

School Year	*White*	*Black*	*Total*	*% Black*	*% White*
1968-69	16	47	63	74.6	25.4
1969-70	11	33	44	75	25
1970-71	8	14	22	63.6	36.4
1971-72	16	10	26	38.6	61.4
1972-73	17	10	27	37	63
1973-74	No Figures				
1974-75	15	8	23	34.8	65.2

These statistics (a part of the record in another case pending in the District Court which heard the instant case) present a *prima facie* case of racial discrimination rendering all of defendants' employment practices suspect, *Keyes* v. *District No. 1*, 413 U.S. 189, 209 (1973); *Chambers* v. *Hendersonville City Board of Education*, 364 F.2d 189, 192 (4th Cir., 1966); *McLaurin* v. *Columbia Municipal Separate School District*, 478 F.2d 348 (5th Cir. 1973), and strongly supporting respondents' contention that Mr. Pettey's rule, adopted during a period

of "whitening" of the faculty, was in fact a race-based classification, both in purpose and impact.

Respectfully submitted,

Dated: February 27, 1976

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In The

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NO. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.

Petitioners,

v.

KATIE MAE ANDREWS, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF EQUAL RIGHTS ADVOCATES, INC. AND AMERICAN CIVIL LIBERTIES UNION

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NOTE: All references to the testimoney of Superintendent Pettey hereinbelow are marked "P.T." (Pettey Transcript); all references to the testimony of Mrs. McCorkle hereinbelow are marked "Mc.T." (McCorkle Transcript).

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Respondents.

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MOTION FOR LEAVE
TO FILE BRIEF AMICI CURIAE

Equal Rights Advocates, Inc. and the American Civil Liberties Union respectfully move for leave to file a brief amicus curiae in this case. Respondents have consented to the filing of this brief. The letter of consent accompanies this motion and brief, for filing with the Court. Counsel for amici has sought the consent of petitioners to the filing of this brief, by telephonic and written correspondence. As of the time of preparation of this motion, counsel for petitioners has not responded to said requests for consent.

Equal Rights Advocates, Inc. is a non-profit, tax-exempt legal and educational corporation dedicated to promoting equal rights of men and women under law. Equal Rights Advocates, Inc. devotes substantial amounts of time, energy and resources to advancing the constitutional and statutory rights of men and women to be free from unlawful sex-based discrimination in employment.

Lawyers for Equal Rights Advocates, Inc. have participated in a number of cases challenging laws, policies and practices that operate to disadvantage the female child-bearer, including Geduldig v. Aiello, ___ U.S. ___, 94 S.Ct. 2485

(1974), which upheld the denial, against a fourteenth amendment challenge, of state disability benefits to women disabled by "normal" childbirth, and Berg v. Richmond Unified School District, ___ F.2d ___ (9th Cir. 1975), which affirmed a Title VII decision adjudging the school district's policies as to maternity leave and accrued sick pay to be violative of the Act. Lawyers for Equal Rights Advocates, Inc. served as amicus curiae in Liberty Mutual Insurance Co. v. Wetzel, No. 74-1245, now pending before this Court, and in Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975), also now pending before this Court sub nom General Electric Co. v. Gilbert.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to defend-

ing the rights of all persons to equal treatment under the law. Recognizing that confinement of women's opportunities is a pervasive problem at all levels of society, the American Civil Liberties Union has established a Women's Rights Project to work towards the elimination of gender-based discrimination.

Lawyers associated with the American Civil Liberties Union Women's Rights Project presented the appeal in Reed v. Reed, 404 U.S. 71 (1971), participated as counsel for the appellants and later as amicus curiae in Frontiero v. Richardson, 411 U.S. 677 (1973), represented the appellant in Kahn v. Shevin, 416 U.S. 351 (1974), the appellees in Edwards v. Healy, 421 U.S. 772 (1975), and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and the petitioners in Struck v. Secretary of

Defense, 461 F.2d 1372 (9th Cir. 1971, 1972), cert. granted, 409 U.S. 947, judgment vacated, 409 U.S. 1071 (1972), and Turner v. Department of Employment Security, ___ U.S. ___, 96 S.Ct. 249 (1975), and acted as amicus curiae in this Court in several other gender discrimination cases.

The American Civil Liberties Union believes that this case poses an issue of great significance to the realization of full equality between the sexes. It concerns women's right to aspire and achieve in accordance with their talents and capacities as individuals, their right not to be caged, in lump fashion, by an indurate classification that relegates them to inferior status in society.

Equal Rights Advocates, Inc. and the American Civil Liberties Union seek

to participate in this case as amici curiae because each organization views the achievement of fair and even-handed treatment of mothers in public employment as basic to the efforts of amici to win equality for working women

Equal Rights Advocates, Inc. and the American Civil Liberties Union believe that the within brief will be of assistance to the Court in resolving the crucial issues before it. The brief offers an historical analysis of the treatment of mothers of "illegitimate" offspring, and it discusses the issues raised by petitioners' exclusion of this group from employment, insofar as the fourteenth amendment's guarantee of equal protection to these persons is concerned.

For these reasons, we respectfully request leave to file the within brief

amicus curiae.

Respectfully submitted,

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In The
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BRIEF AMICI CURIAE

INTEREST OF AMICI

The interest of amici is set forth in the preceding motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici support the position that the policy of petitioners is criss-crossed with constitutional defects, any one of which should prove fatal to it: it discriminates against Black persons on account of race; it infringes grievously upon the rights of privacy and procreative choice; it arbitrarily deprives persons of employment in a fashion causing unconscionable risk and harm to children, including economic suffering and personal shame; and, it discriminates against women on account of sex. Because of the gravity and complexity of the sex discrimination issues raised by this case, we will focus predominantly upon those issues.

For many centuries and across diverse cultures, campaigns have been

conducted through law to prevent child-bearing and child-rearing outside societally respected relationships. Keeping women in their place has frequently been a concern of these campaigns, and women have historically suffered myriad punishments under these sex-discriminatory schemes. The grave problem of employment discrimination against women persists. The policy of petitioners aggravates that problem and activates its worst consequence: poverty. Petitioners' policy excludes from employment a group of women whose work affords not only a resource to society that must be saved from the waste of discrimination, but which affords the means of economic self-sufficiency to these women and their families. (Section I)

On its face, petitioners' policy consists of a prohibition against employ-

ment of unwed mothers. Founded upon expressly sex-discriminatory instructions to the personnel agent, rooted in the avowed purpose of excluding persons who are identifiable by the fact of their parenthood as "bad role models", and structured in the context of state laws that empower male parents to avoid the exclusion from employment, the face of petitioner's policy plainly contains a sex-based classification. (Section II-A).

Under the policy, five females and no males have been excluded from employment by petitioners. Even were facial neutrality attributed to the policy, its application has been, and is assured by its structure to continue to be, sex-discriminatory against women. (Section II-B).

The sex-discriminatory nature of

petitioners' policy offends the equal protection clause. The policy finds no rational foundation in petitioners' "role model" theory, insofar as the policy's focus and structure immunize most offenders of the "role model" premise from the exclusion from employment. The policy bears neither a fair nor a substantial relationship to any legitimate aim of public school authorities. Additionally, in their utilization of female sex as the cutting edge of their categorical exclusion from employment, petitioners have drawn a line which, for equal protection purposes, merits strict scrutiny by this Court. (Section II-C).

I. PETITIONERS' POLICY REPRESENTS A SEVERE HISTORICAL RETROGRESSION, AGAINST THE PRINCIPLE OF ENDING SEX DISCRIMINATION UNDER LAW.

A. The History of Anti-Illegitimacy Measures Is Thematically Linked To Discrimination Against Women.

The concept of "illegitimacy" has varied in its legal dimensions across cultures and eras, shaped and reshaped by diverse societal, religious and economic views of human sexuality and by different and changing norms of manhood, womanhood and childhood. With this pervasive variability, one constant appears: where legal and moral authorities have punished the offspring of sexual intercourse occurring outside the bounds of approved relationships, those authorities have likewise punished the maternal biological parents of these children, and

vice versa.

A dramatic and appalling example of this interaction lies in the experience of mothers and children under the English Poor Law Amendment Act of 1834, which purportedly sought to prevent false accusations of paternity by removing the financial responsibilities of putative fathers, while in fact sanctioning the mothers of "illegitimate" children through severe financial penalties. The Act resulted in a crystallization of

> "... the popular view of the day, that it was the woman with an illegitimate baby who was guilty of succumbing to temptation and the man was not to be equally blamed... it had been decided that erring women should suffer to the full consequences of a 'fall'". 1/

1/ D. Dewar, Orphans of The Living: A Study of Bastardy 20-21 (1968).

One apparent consequence of the Act was infanticide. Around the time of the Act's imposition of severe penalties upon mothers of illegitimate children, Benjamin Disraeli, in his sociologically informed novel, Sybil, observed in 1845:

> "Infanticide is practiced as extensively and as legally in England as it is on the banks of the Ganges...". 2/

Social and economic suffering for the mothers and children affected were the alternatives to abortion, infanticide and the anonymous delivery of infants to foundling homes in which many died.3/

2/ As quoted in W. Langer, "Europe's Initial Population Explosion", 69 American Historical Review 1-17 (1963).

3/ The practice of anonymous abandonment of infants was by no means confined to "illegitimate" mothers, for "... the statistics show that of the thousands of children thus abandoned, more than half were the offspring of married couples." Id. at fn 5/.

In eighteenth century rural France the phenomenon of "illegitimacy" was a great deal less statistically common than it was in England, but the socio-economic situation of the unmarried French mother was similar; it has been described by at least one famous demographer as "exceptional and difficult."4/ Heavy social, legal and moral stigmatization of "illegitimacy" in France and in England had completely opposite effects upon "illegitimacy" rates -- a telling comparison, in the context of petitioners' recited purpose of deterring teenage

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4/ P. Goubert, "Legitimate Fecundity and Infant Mortality in France During The Eighteenth Century: A Comparison", reprinted at 97 Daedalus 593-594 (Spring, 1968)(Historical Population Studies).

"illegitimate" pregnancy [5].

Severe punishments including death itself have been visited upon mothers of "illegitimate" children, motivated and justified by [6] vindication of what is commonly called "the double standard" of sexual morality, under which women must

[5] Superintendent Pettey testified below that "(I)n Drew, we have had in the last two years... an alarming number of school girl pregnancies... I think that this is a problem that we as school people, responsible for the development of children, should try to do something about." (P.T.8, 9).

[6] As of 1964, in countries around the region of Togo, the unmarried mother "... is often considered as having brought shame and dishonour to the whole family and as a result, in extreme cases, is murdered by her brother or her father while no punishment or hardly any is imposed on the man involved." United Nations, Document #ST/TAO/HR/22 at paragraphs 134-135 (1964). Refer also to note 12/, infra. Death is the penalty for "illegitimate" maternity in other regions as well. S. Hartley, Illegitimacy 12 (1975).

remain virginal and uninformed about sexual matters until marriage, obedient and ignorant of matters such as contraception within marriage, hostile toward divorce and infidelity, and generally ashamed of and displeased about sexual intercourse.[7]

[7] In 1880, the Reverend William John Knox Little summarized many of these aspects of woman's place under the double standard of sexual morality as follows: "God made himself to be born of a woman to sanctify the virtue of endurance; loving submission is an attribute of a woman; men are logical, but women, lacking this quality, have an intricacy of thought. There are those who think women can be taught logic; this is a mistake. They can never by any power of education arrive at the same mental status as that enjoyed by men, but they have a quickness of apprehension, which is usually called leaping at conclusions, that is astonishing. There, then, we have distinctive traits of a woman, namely, endurance, loving submission, and quickness of apprehension. Wifehood is the crowning glory of a woman. In it she is bound for all time. To her husband she owes the duty of unqualified obedience. There is no crime which a man can commit which justifies his wife in leaving him or in applying for that monstrous thing, divorce. (continued on page 11)

Under this "double standard", men are expected to be sexual teachers of their virginal wives, and their sexual experi-

7/(Con't)
It is her duty to subject herself to him always, and no crime that he can commit can justify her lack of obedience. If he be a bad or wicked man, she may gently remonstrate with him, but refuse him never. Let divorce be anathema; curse it! curse this accursed thing, divorce; curse it! curse it! Think of the blessedness of having children. I am the father of many children and there have been those who have ventured to pity me. 'Keep your pity for yourself', I have replied, 'they never cost me a single pang'. In this matter let women exercise that endurance and loving submission which, with intricacy of thought, are their only characteristics." Reprinted in E. Hecker, A Short History of Women's Rights 151-152 (Putnam, 1910).

ences outside matrimony are to be condoned, because the blame for such experiences is upon the immoral, seducing female.[8/]

To adherents of that double standard of human sexual behavior, the mother of "illegitimate" offspring symbolizes defiance of the moral order: she is a woman who is publicly known not to be virginal and she is unmarried. So she has been the bearer of many and diverse punishments, often involving deprivations upon her child or children, intended to make her suffer for her violation of the double standard. Even where the child is not the direct object of punishment,

8/ O.S. Fowler, Perfect Men, Women and Children 180 (1878); Mark Twain, Letters From The Earth 40 (1962).

the child too suffers:

> "... illegitimate pregnancy is in itself a great blotch upon a woman's virtue. Hence, in so far as the child identifies himself with his physical mother -- as he is bound to do in our culture -- he will profoundly be affected by the knowledge of his illegitimacy...". 9/

Under the double standard of sexual morality, the woman who does not dedicate herself solely to child-rearing within marriage has been viewed by religious, social and legal authorities as a violator of the basic natural order of

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9/ Davis, "Illegitimacy and the Social Structure", 45 Am. J. Soc. 215, 228, 231-233 (1939).

humanity.10/ The double standard is thus preserved where women are relegated to giving to society, and to receiving from it, only those values afforded by marriage and family roles; other kinds of exchanges of values between woman and society --

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10/ "It has often been said that a person born out of wedlock, the parents of that person (the mother much more so than the father), and sometimes the entire family of the mother, suffer a stigma as the result of the nature of the birth. Words as strong as 'discredit', 'disdain', 'shame', 'contempt' and 'condemnation' have been used to describe that stigma. When it exists, it impairs the social position, not only of the person born out of wedlock, but also the mother, thus constituting for her an obstacle to the realization of a normal life in the community in which she lives." Secretary of the United Nations, Report: "The Status of the Unmarried Mother: Law and Practice" 56 (1971).

including education, non-domestic employment, voting, office-holding, jury service and ownership of property -- have been publicly disapproved and legally prohibited.[11/]

In the eighteenth and nineteenth centuries, Western political and religious authorities battled openly against movements for equal rights for women, positing that legal freedom of women would lead to the demise of marriage and family

11/ A summary of these legal disabilities may be found in L. Kanowitz, Women and the Law: The Unfinished Revolution passim (1969). More detailed discussions are presented in Davidson, Ginsburg and Kay, Sex-Based Discrimination (1974) and in Babcock, Freedman, Norton & Ross, Sex Discrimination and the Law: Causes and Remedies (1975).

structures.[12/] For example, the Church of England campaigned against contraception as part-and-parcel of its opposition to

12/ W. Chafe, The American Woman 5, 9-11 (1972); Hankins in "Illegitimacy: Social Aspects", 7 Encyclopaedia of Social Sciences 579, 580-81 (1932) states in part: "Viewing woman as the chief source of sin Christianity tended to degrade motherhood, to accentuate masculine supremacy and to maintain a double standard of morality. It thus inflicted an often unbearable cruelty upon the unmarried mother and an almost certain degradation upon her off-spring. In medieval and early modern times the mother was often required to confess her sin before the congregation in both Catholic and Protestant Communities; and she was sometimes fined, sometimes publicly whipped, sometimes placed in stocks, and the child was neglected and socially ostracized, while the father suffered little or no penalty."

the emancipation of women.[13] Those who spoke of contraception as a means by which the status of men, women and children might be improved were scorned and cast out for their radicalism.[14] The idea that

13/ "The Church of England was slower to face the challenge presented by new social conditions -- particularly the growing demand for women's emancipation -- and was more reluctant to change its traditional doctrine about sex, marriage and the family... Regret was expressed at the decline of the birth rate among English-speaking peoples, especially the upper and middle classes, and it was suggested that many physical and mental diseases might be a direct consequence of the use of contraceptives. The bishops (footnotes omitted), having denounced birth control as "preventive abortion", recommended that all contraceptive appliances and drugs be prohibited by law and their advocates prosecuted." F. Campbell, "Birth Control and The Christian Churches" 14(2) Population Studies 142 (1960).

14/ See for example the discussion of Francis Place's paper of 1822, entitled "To The Married of Both Sexes of the Working People", at G. Hardin, e.d., Population, Evolution and Birth Control 192-193 (1969).

contraception, abortion and "illegitimate" pregnancy directly violated the proper role of women and together threatened the institution of marriage itself was also given voice by medical professionals, inspired by religious campaigns against female social and legal equality.[15]

15/Isaac Pierce, M.D., writing for the Medical and Surgical Reporter in 1888, states in pertinent part:
"Every man knows the horrors of illicit love and the suffering of misguided though patient and confiding women; no man is insensible to the lifelong shame of a child thrown upon the world without knowing a father, and no man denies the wickedness of criminal abortion. No medical man doubts the suffering, and in many cases permanent injury, of the woman who practices abortion that she may shield herself and her destroyer from the condemnation of the world...

Let it become generally known that the medical profession countenances a preventive even in a few cases, and there is reason to fear this will be stretched to a license which will work much mischief to women who are already experimenting in this direction, who have no reason why they should not fulfill the God-given function which makes happy homes, and who are now only held in check by the judgment of the world."Pp. 614-616.

Integral to preservation of the model of the adult female as fit only for the roles of wife and mother were drastic constraints upon her access to the educational system in this nation. From the inception of the educational system of this nation, the opportunities of women for employment in that system have been profoundly and consciously manipulated because of their female sex, marital and maternal status. This pattern of manipulation, commencing with total prohibitions against female teachers[16/] and reaching almost to the present through categorical restrictions upon employment of pregnant teachers[17/], has been con-

16/ R. Callahan, An Introduction to Education In American Society 383-384 (1956).

17/ Brief Amicus Curiae For The National Education Association et al., in Cleveland Board of Education v. LaFleur, Sup. Ct. No. 72-777, at pp. 10-14 (1972).

sistently intertwined with vindication of the above-described double standard of human sexuality and the "woman's place" model of female rights and responsibilities.

So it was that prior to 1830, the United States' public teaching profession was composed almost exclusively of men.[18/] A movement to include women as teachers, commencing in the 1830's and culminating in a great influx of women into the teaching profession during the Civil War, contributed demonstrably to the general enhancement of women's employment opportunities, and increased public respect for the social contributions of women.[19/] Married women were nonetheless widely prohibited from teaching and related occupations until World

18/ W. Elsbree, The American Teacher 199 (1939).

19/ Id. at 201-207.

War I, [20] and many such prohibitory laws and policies were re-established after World War I[21] and again after World War II.[22] The fundamental basis of these exclusions appears to have been an admixture of sentiments about the morally damaging and hazardous influence of married women upon students[23] and sex-

20/ C. Atkinson & E. Maleska, The Story of Education 346-347 (1965).

21/ I. Woody, A History of Women's Education In The United States 509, 513 (1966).

22/ Id.

23/ "The employment of married women teachers in the public schools of the United States has ever been a controversial question. Custom has long decreed that the school ma'am be celibate and most school boards not only refuse to employ married women, but also stipulate that the employed unmarried teacher must resign her position as soon as she becomes a wife." Donovan, The School Ma'am 57 (Stokes Co. 1938).

based economic notions about male breadwinning and female domesticity in family structure.[24]

Like their historical predecessors, who first excluded all women, and who next excluded married women, from teaching and related occupations, petitioners in this case claim that their policy is designed solely to improve the moral stmosphere of schools by removing women who have chosen a course of personal conduct that is believed to convey a bad

24/ "Opposition to the employment of married women as teachers is generally recognized as stronger in smaller rather than larger city systems. In smaller communities there still prevails the traditional attitude that woman's place is in the home, that her husband is expected to provide an income for the maintenance of the family, and that his prestige depends upon his ability to do this." Id at 60.

example to students. In this way, petitioners' policy joins a long line of sex-discriminatory laws, policies and practices, purportedly directed at manipulating the image of women in public education in order to transmit a particular moral philosophy to students.

B. Petitioners' Exclusion Of Unmarried Mothers From Employment Menaces The Achievement Of Equal Opportunity By Women.

Proposals to create equal employment opportunities without regard to sex are at least as ancient as Plato's Republic.[26/] Alongside such philosophical ideas about the means to equality, the reality stands that:

> "...(n)o society has restructured both the occupational system and the domestic establishment to the point of modifying the old division of labor by sex." 27/

As Justice Brennan observed in the plurality opinion in Frontiero v. Richardson,

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26/ In Chapter XV, Socrates explains how the principle of equality of the sexes should work. F. Cornford trans., The Republic of Plato, 144-155 (1966).

27/ K. Davis, "Population Policy: Will Current Programs Succeed?", 158 Science 736-737 (1967).

411 U.S. 677 (1973), sex discrimination in employment continues to confront women in the United States, in spite of legislative and judicial efforts to overcome it.

The notion that women can avoid employment discrimination because women are free to forego the non-domestic working world has little validity in this country, where a substantial and increasing proportion of the female population works outside the home out of sheer economic necessity.[28/] In families whose sole breadwinners are females, the economic need to work is obviously most intense. Yet the very families whose livelihood is

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28/ As of 1970, there were 5.6 million families headed by women in the United States, of which almost one-third had family incomes below the poverty line of $3,700 for a family of four. R. Stein. "The Economic

cut off by petitioners' exclusion of mothers of "illegitimate" children from employment are within this most economically needy group.

There can be no doubt that access to employment free from invidious discrimination has paramount significance in the realization of equal employment opportunity under law. Petitioners' exclusion strikes multiple blows against the unmarried mother whose employment provides her family's livelihood: the excluded mother is deprived of economic self-sufficiency; she is foreclosed from making the contribution to society that her work affords; not only is the principle of equal opportunity violated, but the means

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28/ cont'd.
Status of Families Headed By Women", in U.S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review (Dec. 1970).

of making that principle real and of giving it meaning - employment - is taken from her by petitioners, for the rest of her life.

II. PETITIONERS' POLICY DISCRIMINATES AGAINST FEMALES IN VIOLATION OF THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION.

A. Petitioners' Policy Is Facially Sex-Discriminatory.

Amici contend that the policy of petitioners herein at issue warrants treatment by this Court as a facially sex-discriminatory policy, for four reasons. First, the actual phrasing of the unwritten policy, effectuated in the form of an oral instruction to exclude unwed mothers from employment, contained that sex-based classification. Second, regardless of the wording of the unwritten policy, it was designed and structured in direct reliance upon the greater identifiability of

mothers than of fathers of "illegitimate"[29/] children. Third, under Mississippi law, fathers may take action to legitimate their children born out of wedlock, thus escaping the exclusion from employment, whereas mothers are legally incapable of doing so. Fourth, the declared purpose and the method of enforcement of petitioners' policy assure that it will not reach and exclude male parents of "illegitimate" children from school district employment.

The record in this action fully sustains the position that petitioners' policy was articulated to find and exclude

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29/ In 1945, Justice Schauer of the California Supreme Court opined that it would seem fairer to refer to the offspring of unmarried parents as the morally neutral children of "illegitimate parents". Estate of Lund, 26 C.2d 472, 159 P.2d 643 (1945). Amici have placed the term "illegitimate" in quotation marks throughout this Brief because they

from employment a class composed solely of women. Under cross-examination, Superintendent Pettey, who designed the policy (P.T. 3), admitted that his instruction to Mrs. McCorkle, who was charged with investigating and recommending certain applicants (P.T. 11), specifically consisted of a prohibition against hiring unwed mothers (P.T. 28) and that he gave Mrs. McCorkle no instructions whatsoever as to exclusion of male applications who had fathered "illegitimate" children (P.T. 23-24).

Moreover, there is a compelling reason to define the face of petitioners' policy as consisting of the exclusion of unwed mothers from employment. Because

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29/ cont'd.
believe that, whatever group the term is used to modify, it invites injustices. (See Section I, above.)

the policy remained an unwritten one to and through the trial below, for this Court to define the face of the policy as consisting of the phrasing given to it in the adversary context of litigation, by its defenders, would work a serious mischief. Such a judicial definition of the policy's face would encourage governmental authorities to propound unwritten policies containing overtly discriminatory classifications, and subsequently to give clear and neutral-seeming phraseology to such policies only if and when challenged under the Constitution. Cf. Niemotko v. Maryland, 340 U.S. 268 (1951). Even the more neutral-seeming phrasings[30/] of the policy

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30/ At one juncture Superintendent Pettey stated that the policy excluded unwed parents. (PT 23,24.) At a second juncture he stated that the policy excluded parents of illegitimate children (P.T. 3, 15.) At a third juncture, as discussed hereinabove, Superintendent

do not redeem it from its facially sex-discriminatory character.

Both in structure and in the purported justification of their policy, petitioners have relied directly and impermissibly upon the greater identifiability of mothers than of fathers.[31/] Indeed, in their

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30/ cont'd.
Pettey indicated that he instructed Mrs. McCorkle to exclude unwed mothers. (P.T. 28.)

31/ In the case of Sanders v. Tillman, 245 S.2d 198 (Sup. Ct. Miss. 1971), which offers the most recent definition of "legitimation" under Mississippi law, the Supreme Court of Mississippi observed in relevant part: "It is a simple matter to prove the maternity of an illegitimate child, but is infinitely more complex and difficult to prove the paterntiy. It is only necessary for the father to be present at the laying of the keel, not at the launching of the ship. The mother must be present at both, and it is not at all difficult to prove who launched the ship." 245 S.2d at 200.

answer to the complaint, petitioners asserted that:

> "...the regulation bears only upon the Plaintiffs' open and notorious display of a status which is within the province of the school district to regulate in determining who may teach." (Answer, p. 3, ¶XV.)

Generally only mothers would be capable of such open display of unwed parenthood in this culture. (It bears emphasis that, as a matter of record, none of the respondents in this case was at any time engaged in any display whatsoever of her status as an unmarried parent; to the contrary, agents of petitioners affirmatively searched for information as to the marital and parental statuses of the respondents. (P.T. 9, 10, 28, 29; Mc.T. 13, 23, 24, 36, 37, 42)).

Furthermore, to the extent that petitioners are referring to the status of being a childbearer out of wedlock, it

must be considered that no father is capable of such a status. To the extent that the policy refers to the fact of child-rearing, it must further be considered that unwed fathers in this society do not generally rear their children.[32/] Finally, while Mississippi law provides a means by which a father may legitimate his offspring born out of wedlock, no such legal means is available to the mother; the father may marry the mother and acknowledge the child, rendering it legitimate.[33/] Thus it emerges that petitioners' policy, insofar as it purportedly excludes parents of "illegitimate" children from employment, operates in a context of state laws that

32/ See footnote 36, infra.

33/ Cf. Sanders v. Tillman, footnote 31, supra; see also, Nichols v. Sauls' Estate, 165 S.2d 352 (Sup. Ct. Miss. 1964).

empower fathers, and not mothers, to legitimate their children and thus to avoid exclusion from employment.[34/]

The structure of petitioners' policy inexcusably disfavors the female parent vis a vis the male parent, even aside from its tandem operation with Mississippi's laws governing legitimation. This Court fully realizes the statistical infrequency of the phenomenon of single male persons who are the custodial parents of children.[35/] Within this phenomenon, the father who is the custodial parent of his child conceived and born out of wedlock must be uncommon

34/ In several states, acknowledgement by the father without marriage accomplishes full legitimation. H. Krause, Illegitimacy: Law and Social Policy 19 (1971).

35/ Cf. Stanley v. Illinois, 405 U.S. 645 654-656 (1972).

Court find that policy of denying employment to unwed mothers, while allowing unwed fathers to teach, violates the most stringent test of equal protection.

CONCLUSION

For all of the foregoing reasons, as well as those urged by respondents, the decision of the Fifth Circuit Court of Appeals should be affirmed.

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indeed.[36/] Thus, by its reliance upon the fact of custody to locate parents of "illegitimate" children, the structure of petitioners' policy excludes fathers by means of the virtual impossibility of locating a male custodial parent of an "illegitimate" child.

Petitioners have made two essentially irreconcilable contentions about the

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36/ Id. As of 1970, 98.67% of all persons under 18 years old in the United States were living either with both parents or with a female head of family. U.S. Bureau of the Census, 1 Characteristics of the Population Table 54, p. 1-278 (1970). Only 0.2% of all persons under 18 years old were living with fathers who were single (i.e., never married, separated, widowed or divorced). U.S. Bureau of the Census, Subject Reports: Persons By Family Characteristics 1 (1970).

relationship between their policy and the group of female parents of "illegitimate" children excluded thereby. On the one hand, petitioners claim that males and females who engage in conduct resulting in the birth of an "illegitimate" child are equally bad role models in instructional contexts, and that they are therefore equally subject to the exclusion from employment under that ostensible purpose. On the other hand, as the portion of the answer quoted above (see text after footnote 31) emphasizes, and as District Court Judge Keady below observed:

> "Defendants argue that when a single woman engages in premarital sexual relations, become pregnant and begets an illegitimate child, she voluntarily places herself in a classification in which men are not similarly situated, and hence, a regulation which treats women differently is justified." 371 F.Supp. 26, 36.

Thus, there is little doubt that petitioners' policy, by its language, structure, method of enforcement and declared purpose of regulating "open and notorious display" of the status of unwed motherhood, treats women differently from men. In terms of petitioners' own position that both parents of "illegitimate" offspring are bad role models in instruction contexts, the sex-differential compass of petitioners' policy, which encircles mothers and omits fathers of "illegitimate" children, is unjustifiable.

B. As Applied, Petitioners' Policy Discriminates Against Women.

The factual record in this action underscores the sex-discriminatory fashion in which petitioners' policy has been administered. The assertion that the policy is to be applied to both sexes is belied on the face of the record: under the policy, five females and no males have been excluded from school district employment (M.c.T. 14, 20, 42). Section II-A demonstrated that petitioners' policy is structured to find and exclude women. Amici contend that this "women only" result should therefore be viewed as the utterly predictable consequence of a facially discriminatory classification. However, even were the policy deemed fair and neutral on its face as to the sex of persons to be excluded from employment, the policy

represents a classical situation of discriminatory application.

The doctrine that illegal discrimination accomplished by application of a neutral-seeming law will not be countenanced is a long-standing element in the strength of the United States Constitution. Yick Wo v. Hopkins, 118 U.S. 356 (1886). As in Yick Wo, the Court here is confronted by a record evincing a wholly unequal application, as between persons similarly situated, of a governmental prohibition materially affecting those persons' rights. The administration of petitioners' policy invites and assures continuation of this unequal application, in that petitioners have depended frontally upon the reality, rooted in biology, state law and maternal custody patterns, that mothers of "illegitimate" children are

usually identifiable and excludable where fathers, similarly situated under the purported purposes of the policy, are not. As in Yick Wo, the petitioners' policy here has been unequally and discriminatorily administered, and it must fall.

C. Petitioners' Policy Fails Every Test Of Equal Protection To Be Guaranteed To Women In The Context Of Public Employment.

Both on its face, and as applied to respondents, petitioners' policy achieves a discrimination against women as mothers of "illegitimate" children. That discrimination is wholly unjustifiable under the Fourteenth Amendment guarantee of equal protection.

The policy of petitioners does not begin to fulfill the rigorous rational basis test of equal protection to women and men propounded by this Court in

Reed v. Reed, 404 U.S. 71 (1971). As Chief Justice Burger reasoned therein:

> "The Equal Protection Clause... does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." Id. at 76-77.

Petitioners have insisted that the purpose of their policy is to exclude from instructional employment persons who, by virtue of their participation in out-of-wedlock sexual intercourse that results in "illegitimate" births, are immoral role models for students.

Petitioners' policy bears neither a fair nor a substantial relationship to the policy's declared purpose, as required for equal protection purposes by Reed v. Reed, supra. The criterion of sex is wholly unrelated to the policy's pur-

pose, which is to exclude bad role models from employment. Surely the father of "illegitimate" offspring is as much or as little a bad role model[37/] as the mother; yet, because of his sex, he is outside the policy's structure and enforcement scheme. Thus it appears that petitioners' policy bears no demonstrable relationship to the declared end.

Wholly aside from its discrimination on account of sex, the policy draws a set of arbitrary lines among women, each of which moves the policy further away from the fair and substantial relationship to the governmental purpose which, under

37/ For purposes of the discussion of equal protection herein, amici have assumed arguendo that petitioners' "role model" theory has some factual validity. However, the District Court found that it does not, and there is substantial evidence in the record to support that finding.

Reed, the policy must bear. The pregnant woman who elects abortion, or who abandons or even destroys[38] her infant, is outside the policy; it is only the woman who elects to give birth and to fulfill custodial responsibilities to her offspring whom petitioners' policy excludes from employment. By the "bad role model" theory of petitioners, all of these women are en-

38/ "It bears emphasis that community disapproval and penal sanctions against the mother may intensify the mother's desire to protect her anonymity and rid herself of the infant. Although the incidence of infanticide and abandonment are not as great as they were in Puritan days... the pressure on the modern unmarried mother may result in either illegal induced abortion or anonymous release of the child for adoption." C. Foote, R. Levy & F. Sander, Cases and Materials On Family Law 118 (1966).

compassed[39]; yet the policy arbitrary selects only the last, and excludes her from employment. Along with its irrational line between men and women, these additional lines drawn among women by the policy underscore its lack of relationship to the purpose of excluding "bad role models" from employment.

The case at bar does not require this Court to reach the question, which has at least once divided it, as to the proper jurisprudential status of the category of "sex" for equal protection purposes. Cf. Frontiero v. Richardson, 411 U.S. 677 (1973). Nonetheless, if this Court were to view the policy of petitioners as somehow capable of surviving the substantial rationality test of Reed, we urge

39/ The prospective mother of an "illegitimate" child who elects abortion is a double sinner, in some views. See footnote 15/, supra.

that the reasons for holding sex to be a suspect category, delineated by Justice Brennan in Frontiero v. Richardson, supra, should be found wholly persuasive in the instant case. By the language, structure and method of enforcement of their policy, petitioners have targeted mothers, because of their sex, for exclusion from employment in a fashion that makes these women the direct victims of a poorly designed and ill-considered form of behavioral architecture.[40/] Petitioners'

40/ See Section I. A-B., above. The exclusion from employment of men in order to encourage marriage and procreation would seem to be every bit as ill-considered, although at least one public minister, J.L. Muret of the canton of Vaud, Switzerland, suggested it in 1766, saying "... A means which would seem very efficient, and be the more appropriate since it would enhance population more directly, would be to bar from all employments the non-married men...". J.L. Muret, Memoire sure l'etat de la population dans le pays de Vaud", in Memoires de la Societe Economique de Berne 57 (1766).

policy represents an unwarranted return to the times during which stigmatization of unwed mothers was a tool, along with forced pregnancy, compulsory marriage and deprivation of birth control information, by which women were kept in their legal and societal place.[41/] The policy thus invokes the historical and legal reasons for holding that sex, like race, should be viewed as a suspect category for equal protection purposes. Whatever changes may be promised or predicted on the road to equal opportunity without regard to sex, the stigmatization and exclusion from public employment of women who bear "illegitimate" children can only be viewed as a backward step. Amici urge that this

41/ See fn's 12/, 13/, and 15/, and accompanying text, supra.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, et al., *Petitioners,*

vs.

KATIE MAE ANDREWS, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE CHILD WELFARE LEAGUE OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE CHILD WELFARE LEAGUE OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

For over fifty years, the Child Welfare League of America has been an advocate for children, devoting its efforts to the improvement of care and services for deprived, neglected and dependent children. The League is a non-sectarian federation of almost 400

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[1] A motion for leave to file this brief *Amicus Curiae*, pursuant to Supreme Court Rule 42(3), has been filed with the Clerk of this Court under separate cover.

child welfare agencies in the United States and Canada. It provides leadership and services to the child welfare field, and serves as a national clearinghouse and forum for exchange of knowledge and experience. It acts as a coordinator, a catalyst, and an advocate.

Almost all League affiliates provide direct services for children, services that reinforce the ability of parents to meet the child's needs, services that supplement the care which the child receives from parents, and services that substitute for parental care when necessary. Among the many services provided by affiliates are services for children in their own homes, protective services, shelter care, day care, homemaker services, foster family care, group home care, institutional care, residential treatment for emotionally disturbed children, adoption services, day treatment, maternity homes and services for unmarried parents. In addition, the League itself conducts research, provides consultation to agencies and communities, provides information for public education, organizes annual regional conferences, and publishes a monthly journal, *Child Welfare,* a quarterly *CWLA Newsletter,* and numerous pamphlets and leaflets.

The League also has initiated and sponsored numerous special projects, including the Foster Parent Project and the Adoption Resource Exchange of North America. It has assumed administrative responsibility for the Consortium on Early Childbearing and Childrearing, a task force of agencies within the U.S. Department of Health, Education, and Welfare devoted to helping communities implement programs which enable teenage girls who are parents to stay in school, and which provide them with health and social services.

Amicus has traditionally been concerned with improving conditions of child life and promoting the opportunities that are essential to the health and well-being of children. *Amicus* has reviewed the arguments of Petitioners, Respondents, and other *Amici* herein, and concludes that no other party will adequately present to this Court the deleterious impact upon children of the challenged rule. While the harm to children is not directly at issue herein, the interests of children are directly affected by the result. *Amicus* believes that it is particularly qualified to bring these interests to the attention of this Court and that this case should not be decided without an understanding of how the challenged rule affects children. It is this issue alone that *Amicus* addresses in its brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

There are no illegitimate parents, only illegitimate children.[2] In this brief, *Amicus* will argue that the impact of the rule imposed by Superintendent Pettey of the Drew Municipal Separate School District has the effect, as described in the Old Testament, of "visiting the iniquity of the fathers upon the children,"[3]

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[2] *But see, In re Woodward's Estate,* 230 Cal.App.2d 113, 40 Cal.Rptr. 781, 784 (1964).

[3] *Exodus* 20:5.

and is for that reason a rule which deprives "illegitimate" children, as much as their parents, of rights protected by the Constitution and acknowledged by this Court.

In this society, the jobs people hold affect virtually every aspect of their lives. Income from employment directly determines the quality of life, affecting many of its components, such as housing, medical care, nutrition and education. Barriers to employment adversely affect not only the worker but the worker's family, especially the children. This Court has repeatedly affirmed the right of persons in this society to make a living through employment,[4] and the Congress has repeatedly declared that it is the policy of this nation not only to outlaw barriers to employment[5] but to encourage everyone to work if possible.[6]

As this brief will show, unwed parents are more likely to be poor than are parents who have been married. Moreover, each year there are greater numbers of unwed parents than ever before. Hence, greater and greater numbers of children will be affected by rules or policies such as the rule in the present case, and those children will inevitably bear the consequences of living in a home where their parents are not only likely to be unemployed, but are actually precluded from seeking work for which they have been trained.

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[4]*E.g., Truax v. Raich,* 239 U.S. 33, 41 (1915).

[5]*E.g.,* Title VII, Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*

[6]*See, e.g.,* Social Security Amendments of 1972, 42 U.S.C. §§602a(5)(A),(8)(A)(ii), and (19); §630 *et seq.*

It hardly need be said that the impact on a child of living in a home in which the child's parent is unemployed can be severe. In addition to the problems of inadequate nutrition, medical care, clothing and housing, the lack of gainful employment for an unwed parent who, as a result, cannot adequately support her children can lead to the breakup of the family itself. Such a consequence violates strong policies expressed many times by this Court as well as by the U.S. Congress. The "importance of the family" emphasized in these policies is as great if the parent is unmarried as it is if a marriage ceremony has taken place. *Stanley v. Illinois,* 405 U.S. 645, 651 (1972).

The Drew School District's rule also violates the strong policy, enunciated by this Court on many occasions, of protecting the privacy of persons against unwarranted governmental intrusion. Were it not for that rule, the public might never learn of the marital status of the parents. Furthermore, the right of privacy extends to the children who may more easily be harmed by the stigmatizing designation of "illegitimacy" than may the parents. Indeed, the children may not themselves have any reason to know of their parent's marital status until the issue becomes a matter of concern to the parent's employer or potential employer. Invasions of privacy of this sort have repeatedly been struck down by this Court, and the same should be done here.

In view of the harmful and unlawful impact of the rule under consideration in this case, *Amicus* believes that although the children whose interests are the

concern of this brief are not actually parties to this action, their interests are so inextricably intertwined in the case that the decisions which this Court has issued within the past decade regarding the rights under the Equal Protection Clause of children whose parents are unwed should apply with equal force in this case. *Amicus* believes that the discrimination against unwed parents, to which the Drew School District rule is expressly addressed, is actually and inescapably discrimination against the children of those parents and that such discrimination cannot be constitutionally countenanced by this Court.

ARGUMENT

I. MILLIONS OF CHILDREN WILL BE DIRECTLY AFFECTED BY THE OUTCOME OF THIS CASE

In the decade from 1961 to 1971, enough children were born in the United States of parents who were not married to populate the entire city of Los Angeles.[7] In fact, more than one child of every eight children born in America in 1973 had unmarried parents.[8] Furthermore, from 1951 to 1970, not only has the whole number of such births increased each year,

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[7]SUBCOMMITTEE ON FISCAL POLICY, JOINT ECONOMIC COMMITTEE, 93d CONG., 1st SESS., STUDIES IN PUBLIC WELFARE, Paper No. 12 (Part II), *The Family, Poverty, and Welfare Programs: Household Patterns and Government Policies,* Krause, "Child Welfare, Parental Responsibility, and the State," at 256 (Joint Comm. Print 1973).

[8]HEW, PUBLIC HEALTH SERVICE, HEALTH RESOURCES ADMINISTRATION, 23 *Monthly Vital Statistics Report,* No. 11, "Summary Report, Final Natality Statistics 1973," Tables 8 and 11, at 9 and 11 (Jan. 30, 1975).

but also the ratio of such births to the total has similarly increased annually.[9] In 1973, for example, 407,300 such children were born, an increase of approximately 1% over 1972[10] (during which time the national birthrate actually declined by nearly 5%).[11] "Illegitimacy" is an ever increasing fact of life in America.

A further fact of life is that the families to which such children are born are predominantly poor. According to a recently reported study, approximately 60% of white and 80% of non-white children born to unwed women in the period from 1964 to 1966 were poor or near-poor.[12] Furthermore, according to the same study, eight times as many low-income white women had births out of wedlock as did non-poor white women, and three times as many low-income non-white women had such births as did non-poor, non-white women.[13] These figures demonstrate that the burden of a rule which bars employment of those who have children out of wedlock falls most heavily on those who require the greatest—not the least—opportunities for employment.

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[9]HEW, PUBLIC HEALTH SERVICE, HEALTH RESOURCES ADMINISTRATION, *Vital Statistics of the United States,* Vol. I, "Natality," 1971, Table I-29 at 1-27 (1975).

[10]HEW, PUBLIC HEALTH SERVICE, HEALTH RESOURCES ADMINISTRATION, 23 *Monthly Vital Statistics Report,* No. 11, "Summary Report, Final Natality Statistics 1973," at 4 (Jan. 30, 1975).

[11]*Id.* at 1.

[12]SUBCOMMITTEE ON FISCAL POLICY, JOINT ECONOMIC COMMITTEE, 93d CONG., 1st SESS., STUDIES IN PUBLIC WELFARE, Paper No. 12 (Part I), *The Family, Poverty, and Welfare Programs: Factors Influencing Family Instability,* Cutright, "Illegitimacy and Income Supplements," at 113 (Joint Comm. Print 1973).

[13]*Id.* at 114.

II. BARRING PARENTS FROM EMPLOYMENT MAY IMPOSE IRREPARABLE INJURY ON THEIR CHILDREN

When a parent cannot find work, regardless of her marital status, the impact of her lack of income falls heavily upon her children. Even if the parent seeks public assistance, there is no guarantee that there will be enough family income to provide adequately for the children. In the present case, for example, plaintiff Rogers was earning $250.00 per month before she was discharged and plaintiff Andrews would have been paid $450.00 per month had she been hired.[14] At the same time, a single, unemployed mother with one child in Mississippi received *annual* AFDC benefits of $360.00 and *annual* food stamp benefits of $760.00.[15]

Congress has recognized, as has this Court,[16] that public assistance benefits for children are not at the level at which such benefits are needed. According to a report made to Congress in 1967, "[n]owhere do public welfare payments bring the incomes of the poor who receive them even up to poverty levels."[17] In 1972, amendments were made to the Social Security

[14] *See*, 371 F. Supp. 27, 29, 30.

[15] SUBCOMMITTEE ON FISCAL POLICY, JOINT ECONOMIC COMMITTEE, 93d CONG., 1st SESS., STUDIES IN PUBLIC WELFARE, Paper No. 15, *Welfare in the 70's: A National Study of Benefits Available in 100 Local Areas*, Table 53, at 173 (Joint Comm. Print 1974).

[16] *Rosado v. Wyman*, 397 U.S. 397 (1970).

[17] HOUSE COMMITTEE ON WAYS AND MEANS, 90th CONG., 1st SESS., *Hearings on Social Security Amendments of 1967*, "AFL-CIO Dept. of Social Security Background Statement on Social Security and Welfare," 590 (1967), cited in H. Krause, *Illegitimacy: Law and Social Policy*, 269 (1971).

Act in order "to provide [needed] increases in benefits."[18] Moreover, in Mississippi, in 1972, AFDC benefits were the lowest of all reporting states in the nation.[19] Thus, an absolute bar to employment such as has been created by the Drew School District rule, especially at a time when the availablity of jobs in the economy is in a sharp decline,[20] almost inevitably will result in forcing reliance on public assistance benefits—benefits which do not even approach meeting a family's needs.[21]

It can hardly be doubted that the burden of inadequate financial assistance for a family will fall most heavily on the family's children. For example, children from poor families are much more likely to evidence ill health than are children from families with

[18] HOUSE COMMITTEE ON WAYS AND MEANS, 92d CONG., 2d SESS., *Report No. 92-231*, U.S. Code Cong. and Adm. News 4989 (1972).

[19] HEW, SOCIAL AND REHABILITATION SERVICE, NATIONAL CENTER FOR SOCIAL STATISTICS, *NCSS Report A-2*, "Public Assistance Statistics, December, 1974" (April, 1975). *See*, Tr. p. 67—March 20, 1973—Katie Mae Andrews.

[20] From an average national unemployment rate in 1970 of 4.9% (9.3% for Black females), unemployment rates have climbed sharply until, today, the national rate is 8.3% (13.8% for Black females). *Compare* U.S. DEPT. OF LABOR, *Manpower Report of the President*, Table A-12, at 219 (April, 1971), *with* U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, "The Unemployment Situation: November 1975," Press Release No. USDL 75-695, *and*, U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, 22 *Employment and Earnings* No. 5 (November 1975).

[21] Witnesses at trial testified repeatedly concerning the unavailability of suitable employment in Drew, Mississippi, and the impact of that fact upon their families. *See, e.g.*, Tr. pp. 13-14—March 20, 1973—Betty Barnes; Tr. pp. 22-23, 29-30—March 20, 1973—Violet Burnett; Tr., pp. 36, 39, 42-43, 46, 48—March 20, 1973—Lestine Rogers; Tr., pp. 55-56, 64—March 20, 1973—Katie Mae Andrews.

more adequate financial resources.[22] This is hardly surprising in view of the fact that children from low-income families often suffer from malnutrition with its attendant harms.[23] In summary, available evidence strongly supports what are surely by now, a decade after the inception of the federal "War on Poverty," self-evident propositions: that to be unemployed is to be poor, and to be poor is to live a life of ill-health. Poverty diminishes the quality of life for everyone who endures it, but its effects are most serious and long-lasting for growing children.

III. THE CONSEQUENCES TO CHILDREN OF THE DREW SCHOOL DISTRICT RULE, AS DESCRIBED IN THIS BRIEF, VIOLATE NATIONAL LAWS AND POLICIES

The rule of the Drew School District increases the likelihood that unwed mothers will be unable to find employment at all.[24] As has been shown, the rule thus

[22] "We have sufficient knowledge about the adverse effects of environments associated with low social and economic status to indicate that there is an urgent need for massive programs to meet the health and developmental needs of children being reared in widely different environments during the critical first years of life." *Lengthening Shadows, A Report of The Council on Pediatric Practice of The American Academy of Pediatrics on the Delivery of Health Care to Children,* at 32 (1970).

[23] *See, e.g., The Food Stamp Certification Handbook,* USDA Food and Nutrition Service, at 1 (August, 1974) (describing "low-income households whose limited food purchasing power contributes to hunger and malnutrition among members of such households."). "Associated with childhood undernutrition is an increased mortality, an increased morbidity for various infections, growth failure and possible permanent retardation of intellectual function." Chase, H. P. & Martin, H. P., *Undernutrition and Child Development,* 282 THE NEW ENGLAND JOURNAL OF MEDICINE, No. 17, at 934 (1970).

[24] See note 21, *supra.*

has a direct and adverse impact on the children of those mothers whom it affects. In quite similar circumstances, this Court has looked behind the language of a statute which, by its terms, conditioned public assistance benefits upon the marital status of parents, to declare unconstitutional the resulting discriminatory denial of equal protection to the children of those parents who were unwed. *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973). The words of this Court in that case are certainly applicable here: "[T]here can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate." 411 U.S. at 621.

In *Cahill,* unmarried parents were denied public assistance benefits. Here, unmarried parents are denied jobs. The consequences to the children of those parents in *Cahill,* as here, will be direct and inescapable, and this Court had no hesitation in striking down precisely such discrimination in the *Cahill* decision. There is and could be no suggestion here, as there was not and could not have been in *Cahill,* that the children who are discriminated against under the rule of the Drew School District are somehow less deserving or less in need of adequate food, shelter, clothing and medical care. Hence, the mere fact that the rule here is on its face directed against parents rather than children cannot insulate the rule from the holding of *Cahill* nor from the strictures of the Equal Protection Clause. For this Court to hold otherwise

would be to elevate form over substance in a manner which the *Cahill* decision does not permit.

An additional consequence flows from the rule under consideration which, while it does not so clearly violate a decision of this Court, nevertheless violates well-established national policies. The laws of many states provide that children in low-income families may be declared "neglected" and thereby removed from the home simply because the families are poor:

> Sixteen states still allow poverty to be an explicit basis for declaring a child neglected. The word poverty is rarely used, however; "destitution" is the favored phrase. . . . In addition, fourteen states indirectly authorize intervention on the basis of family poverty because they list failure to provide support, education or medical care as a basis for a neglect finding and do not provide that lack of financial means may serve as a defense to any state intervention or to removal of the child. Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases,* 63 Geo.L.J. 887, 926 (1975) (footnotes omitted).

Furthermore, in addition to the possible involuntary loss of their children through child neglect proceedings, some unwed mothers might feel constrained to give up their children for adoption if retaining the children in their homes meant that opportunities for employment would be substantially curtailed.

Any such consequences which resulted in an increased likelihood that children would not live with their natural parent violates national as well as widely

established state policies which declare that the maintenance of the natural family ties are a paramount concern of society.[25] For example, the Texas Family Code provides that one of the principal purposes of the law is "to provide for the care, the protection, and the wholesome moral, mental and physical development of children . . . , in a family environment whenever possible, separating the child from his parents only when necessary. . . ." Texas Family Code §51.01 (1973). Moreover, decisions of this Court have long accorded the most solicitous protection to the integrity of the natural family.[26]

In 1972, in a decision which has significant implications for the present action, this Court reviewed the extensive litany of prior cases and concluded:

> The Court has frequently emphasized the importance of the family. . . .

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[25] *See,* 9 FAMILY L.Q., No. 1, at 52-53 (1975); HEW, WELFARE ADMINISTRATION, CHILDREN'S BUREAU, "Standards for Juvenile and Family Courts" at 81 (1966); 42 U.S.C. §§601, 608(f).

[26] *See, e.g., May v. Anderson,* 345 U.S. 528, 533 (1952) (a mother's right to the custody of her child is ". . . far more precious . . . than property rights. . . ."); *Ginsberg v. New York,* 390 U.S. 629, 639 (1968); (". . . constitutional interpretation has consistently recognized . . . the rearing of children is basic in the structure of our society . . ."); *Prince v. Massachusetts,* 321 U.S. 158, 165 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923) (the term "liberty" used in the Fourteenth Amendment denotes ". . . the right of the individual to marry, establish a home, and bring up children. . . ."); *Griswold v. Connecticut,* 381 U.S. 479, 495 (1965) (Goldberg, J., conc., joined by Warren, J. and Brennan, J.) (the rights ". . . to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected. . . ."); *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942) ("basic civil rights of man").

> . . . It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Stanley v. Illinois,* 405 U.S. 645, 651 (1972) (citation omitted).

Stanley makes explicit what was clearly implicit in prior decisions of this Court: that the familial relationship has been granted great deference by this Court because such a relationship affects "the important interests of *both parents and child.*" 405 U.S. at 657 (emphasis added). Thus, *Stanley* recognizes what *Amicus* would stress here: that maintaining the ties of the natural family is important for the children as much, or more, than for the parents. *Stanley,* of course, is important here for another reason as well. As here, the children in *Stanley* about whom this Court expressed concern were "illegitimate." This Court should refuse here, as it did in *Stanley,* to countenance discrimination which directly affects the well-being of such children.

IV. CHILDREN OF UNWED PARENTS HAVE AN INDEPENDENT RIGHT TO PRIVACY WHICH IS INFRINGED BY THE DREW SCHOOL DISTRICT RULE

It is obvious that the Drew School District rule infringes the right of privacy of employees or potential employees. What should not be overlooked is the impact of the rule upon the separate—but equally

important—interests of their children. As the District Court below correctly observed, the rule requires investigation into the parental status of school employees and prospective applicants and into the circumstances surrounding the birth of their children. 371 F. Supp. 27, 34. Pursuant to the rule, a school district, or other employer, is empowered to make inquires into highly personal and sensitive matters which may have been previously within the knowledge of the parent alone. Not only does this investigatorial activity itself unnecessarily intrude upon the privacy interests of both child and parent, the subsequent public action taken by the school district on the basis of the information uncovered publicly proclaims the "illegitimacy" of the affected child and may well result in the creation of a stigma upon the child where none previously existed.

In recent years, the right of privacy has been viewed as encompassing various personal rights, protected by the Constitution against unwarranted governmental intrusion, including those activities related to marriage,[27] procreation,[28] contraception,[29] family relationships,[30] child rearing and education,[31] and most recently, the decision of a woman regarding whether to terminate a pregnancy.[32] The basis of the

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[27] *Loving v. Virginia,* 388 U.S. 1 (1967).

[28] *Skinner v. Oklahoma,* 316 U.S. 535 (1942).

[29] *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972).

[30] *Prince v. Massachusetts,* 321 U.S. 158 (1944).

[31] *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923).

[32] *Roe v. Wade,* 410 U.S. 113 (1973).

right to privacy in this Court concerns the most elementary and basic right of citizens to be free from unwarranted inquiry into their personal lives. In *Roe v. Wade,* 410 U.S. 113 (1973), this Court stated:

> In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford,* 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. 410 U.S. at 152.

Justice Douglas, in his concurring opinion in *Roe v. Wade,* traced the right to privacy even further, finding its recognition in a line of cases restraining the government from asserting a general and unfettered power to inquire into the personal lives of citizens. 410 U.S. at 209, n.2.

This basic and fundamental right to be free from unwarranted governmental intrusion into the private affairs of citizens was reiterated by this Court recently in *Stanley v. Georgia,* 394 U.S. 557 (1969):

> [A]lso fundamental is the right to be free except in very limited circumstances, from unwarranted governmental intrusion into one's privacy. "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions

> and their sensations. *They conferred as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." Olmstead v. U.S.,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928). 394 U.S. at 564 (emphasis added).

Lower federal courts have applied these principles to protect citizens from governmental intrusion into their private lives by prohibiting state agencies from requiring the disclosure of medical treatment of individuals, *Roe v. Ingraham,* 480 F.2d 102 (2d Cir. 1973), and prohibiting school districts from administering a questionnaire containing highly personal inquiries about students' family life, *Merriken v. Cressman,* 364 F. Supp. 913 (E.D. Pa. 1973).[33]

The investigation into the private lives of the children and employees in the present case which is compelled by the Drew School District rule intrudes upon the rights of both parents and children to be left alone. The consequences of such investigations, however, are compounded because the inevitable result of the inquiries is public disclosure of what would otherwise be private and confidential information. Indeed, as a direct consequence of the operation of the challenged policy, the stigma of illegiti-

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[33]One of the offensive questions in *Merriken v. Cressman, supra,* included inquiry into the family composition of the students, including the reasons for the absence of one or both parents, 364 F. Supp. at 916. The fact that the inquiry in the instant case is made to the parent, rather than the child itself, does not make the intrusion any less offensive.

macy may be attached to an innocent child where no stigma may have previously existed. As the District Court in this case aptly noted, the rule "is mischievous and prejudicial, requiring those who administer the policy to 'investigate' the parental status of school employees and prospective applicants. *Where no stigma may have existed before, such inquisitions by overzealous officialdom can rapidly create it.*" 371 F. Supp. at 34 (emphasis added). In fact, the record relating to plaintiff Andrews reveals that her discharge as an employee came about as a result of such an "investigation" among her co-workers at the elementary school at which she was employed which uncovered that "she had a child." 371 F. Supp. at 30.

While the District Court's concern below with the creation of a stigma was undoubtedly directed at the stigma attaching to the discharged employee, it is equally clear that the resulting stigma may fall just as heavily—and perhaps with greater consequences—upon the child whose birth out-of-wedlock is deemed the basis for the discharge. The child's "illegitimacy," which may have been a private matter, may become public knowledge as a result of the parent's discharge or denial of employment. Indeed, in many circumstances, the child may have been totally unaware of the facts surrounding his or her birth. Thus, the stigma of illegitimacy may attach, for the first time, to a child as a direct result of the enforcement of a rule such as that under consideration here. Moreover, the information which becomes a part of the school district records may thereafter be made available to the child's own teachers and peers and may haunt him or her for the rest of his or her life.[34]

In view of the potential impact of such a stigma, it is not surprising that this Court has explicitly recognized the interests of children, as well as adults, in their reputations. *Goss v. Lopez,* 95 S.Ct. 729, 736 (1975). There can be little debate that the public proclamation of a child's illegitimacy causes grave damage to his or her reputation. Thus this Court has avoided, whenever possible, reaching a result which might attach the "stigma of bastardy" to an innocent child. *Estin v. Estin,* 334 U.S. 541 (1948). The stigma attached to illegitimacy is also reiterated throughout secular and religious writings. For example, in one treatise published in 1939, it was observed:

> The bastard, like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. Davis, *Illegitimacy and the Social Structure,* 45 Am.J. Sociology 215 (1939), quoted in Krause, *Illegitimacy: Law and Social Policy* (1971).

The Biblical treatment of illegitimates is similarly harsh:

> A bastard shall not enter into the congregation of the Lord; even to his tenth generation shall he not enter into the congregation of the Lord. *Deuteronomy* 23:2.

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[34] *See,* Foder, *Emotional Trauma Resulting from Illegitimate Birth,* 54 ARCHIVES OF NEUROLOGY AND PSYCHIATRY 381 (1945), quoted in H. Krause, *Illegitimacy: Law and Social Policy* 263 n. 14 (1971).

A final revealing piece of evidence regarding the stigma attached to illegitimacy is the fact that at common law, imputation of illegitimacy is deemed to constitute libel *per se*. 50 Am.Jur. 2d, "Libel and Slander," §90. While more enlightened jurisdictions have attempted to lighten the burden of illegitimacy as it falls upon the innocent child, it is nonetheless clear that some stigma and disability from illegitimacy remain. This stigmatization of children which inevitably flows from the Drew School District's rule therefore operates to increase the burdens on a class of children who are innocent of any wrongdoing and who are already subjected to disabilities as a result of their parents' marital status. Such a rule runs directly counter to the cases decided by this Court in recent years which seek to relieve some of the burden of the designation of "illegitimacy."

V. THE HARMS SUFFERED BY CHILDREN AS A RESULT OF THE DREW SCHOOL DISTRICT RULE SERVE TO DEMONSTRATE THAT THE RULE VIOLATES THE RIGHTS OF THE CHILDREN TO EQUAL PROTECTION OF THE LAW

The direct harms to children which result from the Drew School District's refusal to employ any unwed mothers have been shown to implicate interests to which this Court has accorded its special protection. When viewed together, these injuries—the increased possibility that children of unwed parents will be deprived of minimal subsistence needs, will be taken from their natural families, will have their privacy invaded, and will be stigmatized by the label "illegitimate"—can and should be viewed together as resulting in a denial of equal protection of the law for out-of-wedlock children. This Court has held in case after case since *Levy v. Louisiana,* 391 U.S. 68 (1968), when illegitimate children have claimed violation of their Equal Protection rights, that discrimination against out-of-wedlock children constitutes a violation of the Equal Protection Clause.[35] The present case is merely another example of such a violation.

Reviewing the principal decisions regarding the rights of children of unwed parents, this Court has stated their plain meaning to be that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez v. Perez,* 409 U.S. 535, 538 (1973). The present case, in which the rights of such children are directly and inescapably at stake, should be decided in light of this unequivocal line of decisions in this Court reaffirming the principle that

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[35] *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972) (statutory scheme denying equal workman's compensation recovery rights to dependent unacknowledged illegitimate children violated Equal Protection Clause); *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973) (state program of "Assistance to Families of Working Poor" which in practical effect denied to illegitimate children benefits granted to legitimate children violated Equal Protection Clause); *Gomez v. Perez,* 409 U.S. 535 (1973) (where state creates judicially enforceable right of children to seek needed support from natural fathers, equal protection is violated if such an essential right is denied to illegitimate children); *Jiminez v. Weinberger,* 417 U.S. 628 (1974) (statutory bar to disability benefits for illegitimate children born after onset of disability contravenes equal protection provisions of Due Process Clause). *See, Stanley v. Illinois,* 405 U.S. 645, 657 (1972); *but see, Labine v. Vincent,* 401 U.S. 532 (1971).

"imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972). In spite of the fact that it is mothers who are the targets of the Drew School District rule in this case, it is the existence of their children which calls into effect the operation of the rule, and it is the resulting harm to their children which this Court should recognize in holding that the rule is unconstitutional.[36]

In addition to the cases decided by this Court concerning "illegitimacy," a recent case dealing with the employment rights of mothers is also directly relevant. In *Phillips v. Martin-Marietta Corp.,* 400 U.S. 542 (1971), this Court held in effect that a company rule which barred from employment women with children, violated Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000(e)) unless the company could actually prove that the mere fact that a woman

[36]Commentators have discussed at great length the correct equal protection standard to be applied with regard to the "illegitimacy" cases, but such a discussion is outside the purpose of this brief. Suffice it to say here that the equal protection standard which has been applied by this Court in these cases is somewhat more stringent than is found in the traditional "rational relationship" test standard. Nevertheless, even applying the more lenient "rational relationship" standard here, it is apparent that the Drew School District rule has created, in the children who are the concern of *Amicus,* an irrational classification which cannot be permitted to stand. Discussions of the applicable equal protection standards are found, for example, in: *Note, Legislative Purpose, Rationality and Equal Protection,* 82 Yale L.J., 123 (1972); Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine On a Changing Court; A Model For a Newer Equal Protection,* 86 Harv. L.Rev. 1 (1972); Note, *Illegitimacy and Equal Protection,* 49 N.Y.U. L.Rev. 479 (1974).

had a child was somehow significantly job-related. Other than the fact that the mothers under consideration in the present case are unmarried, this case is indistinguishable from *Phillips.* Moreover, in the present case, the Drew School District has already had a full opportunity to prove to the District Court below that the fact that the mothers are unmarried is significantly job-related, but it has been unable to do so. Thus, even though this action was not brought pursuant to Title VII, the policy of that statute, as interpreted in the *Phillips* case, has quite evidently been violated by the rule under consideration in the present action. Unless this Court were to hold that "illegitimacy", as a matter of law, distinguishes this case from the *Phillips* decision, the holding in that case provides ample guidance for the Court's determination here.

Amicus acknowledges that this case can be decided without reaching any direct conclusions of law concerning illegitimate children. The interests of Respondents' children could not be brought directly before the courts in this case, but *Amicus* has emphasized the impact of Petitioner's rule upon them so that this Court will reach its decision with full cognizance of the broader considerations involved in weighing the lawfulness of employment discrimination against unwed mothers. Out-of-wedlock children are not respondents here, but the ability of their mothers to support them free of any taint or injury stemming from the marital status of their parents is directly at issue here. As Justice Powell so eloquently stated for this Court in *Weber,*

> Courts are powerless to prevent the social opprobium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise. 406 U.S. at 175-176.

This case presents this Court with another discriminatory and irrational classification, based upon status of birth, which constitutes a grave threat to the lives of millions of children.

CONCLUSION

For the above stated reasons, and for those stated in the brief of Respondents, the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Dated, San Francisco, California,
December 22, 1975.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

KATIE MAE ANDREWS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

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IN THE

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OCTOBER TERM, 1975

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, *et al.*,
Petitioners,

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KATIE MAE ANDREWS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Education Association ("NEA") hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief amicus curiae on the merits of the case at bar. Respondents have consented to the filing of this brief, but petitioners have withheld their consent.

NEA is a voluntary organization of educators. Its membership consists of approximately 1.7 million persons, most of whom are employed in public school systems.

NEA's members have a substantial interest in the case at bar, for it involves the extent to which school authorities may intrude upon the liberty and privacy of teachers and, more specifically, whether such authorities may bar a teacher from employment because of the teacher's family or marital status. In addition, this case presents issues relating to whether school administrators may establish rules which, while not demonstrably related to effective classroom performance, severely disadvantage blacks and females who are otherwise qualified to work in the public schools.

There is a threshold issue in this case that, so far as we can determine, will not be briefed by the parties. That question is whether this Court should dismiss the writ of certiorari as improvidently granted. As we show in the attached brief, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, as implemented by recent regulations of the U.S. Department of Health, Education and Welfare, serve as standards for determining the lawfulness of rules barring the employment of unwed parents. Because (1) these federal statutory standards must be met by petitioners and the other public school districts of the nation regardless of this Court's disposition of the constitutional issues at bar, and (2) there is no conflict among the circuits on the constitutional issues, we urge the Court to dismiss its writ of certiorari. Alternatively, we ask this Court to affirm the judgment below on the basis of HEW's supervening Title IX regulations.

In addition, NEA believes that it can be of service to the Court in assessing the validity of petitioners' "role model" theory offered here in justification of the rule at issue and in formulating a standard that, while protecting the legitimate interests of school authorities, would help to ensure that school policies do not unduly intrude upon the personal lives of teachers.

Wherefore, NEA requests that this Court grant leave to file the accompanying brief amicus curiae in support of the judgment below.

Respectfully submitted,

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BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

ARGUMENT

I. INTRODUCTION AND SUMMARY

This case arises because the Superintendent of the Drew Municipal Separate School District learned in the Spring of 1972 that an unwed mother of an illegitimate child had had the "audacity" to apply to the school district for a job as a teacher's aide (Pettey, 10, 29).[1] In

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[1] Reference is to the testimony of Superintendent George Pettey at pages 10 and 29 of the transcript of the trial proceedings on March 16, 1973. Our citations to testimony consist of the witness' name followed by the appropriate page of the deposition or trial transcript. Because neither the original record nor an appendix were filed in this Court prior to or during the briefing schedule,

response the superintendent orally decreed that no unwed parent of an illegitimate child could (1) be employed by the school district in any position entailing direct contact with students, or as he later elaborated, (2) serve the school as a secretary, social worker, cafeteria worker, school volunteer, nurse or PTA president (Pet. App. 5 & n.2, 23 n.8). On the basis of this unwritten rule, the superintendent's subordinates terminated the employment of three in-service teacher's aides and one substitute teacher, and rejected the application of one person seeking a job as a teacher's aide (Pet. App. 21 n.6, 22 n.7, 23 n.8). All of these affected persons are black and all are female (*id.*). Two of them, respondents Andrews (the applicant) and Rogers (an in-service teacher's aide), initiated this action to enjoin the enforcement of the rule and prevailed in both courts below.

In section II of this brief, we urge the Court to dismiss its writ of certiorari as improvidently granted or to affirm the judgment below on the basis of recent federal regulations implementing Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* As we show, the Court of Appeals' decision does not conflict with rulings of other federal courts. Moreover, insofar as this case turns upon the constitutionality of a rule that substitutes a conclusive presumption of unfitness for individualized decision-making respecting the employment of unwed parents of illegitimate children, it appears from the record that the rule is one of a kind.

In addition, we show that there are federal statutory standards which must be met by petitioners and other

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we have been unable to provide cites to the original record, as paginated by the clerk, or to review some portions of the record including the pleadings, exhibits and trial briefs.

The opinions of the Court of Appeals and the District Court are printed in the appendix to the petition for certiorari and are cited herein as "Pet. App." followed by the page reference. Petitioners' brief on the merits is cited as "Br."

school districts, irrespective of this Court's disposition of the constitutional issues at bar. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-2, requires school districts, *inter alia*, to establish that their employment criteria are demonstrably related to successful job performance if such criteria have a significant exclusionary effect on blacks or females. As the evidence in this record demonstrates, Drew's rule has excluded only female blacks.

The precepts of Title VII have been built upon and expanded in regulations which implement Title IX's prohibitions against sex discrimination by school districts receiving federal funds. Pursuant to Title IX, the Department of Health, Education and Welfare has established specific rules barring school districts from making marital, parental or family status a criterion of employment unless that criterion is "essential to successful operation of the employment function concerned." 40 Fed. Reg. 24144 (1975), §§ 86.57(a)(1) and (b), 86.60(a), and 86.61. These regulations also bar the use of employment criteria which have an adverse effect on the basis of sex unless such criteria are shown, *inter alia*, "to predict validly successful performance in the position in question" (*id.* at § 86.52(a)). Drew, as we show, cannot meet the standards required by the Title IX regulations.

HEW's regulations were approved by the President and cleared with the Congress prior to becoming effective on July 21, 1975. These regulations are applicable to Drew and approximately 16,000 other school districts irrespective of whether Drew's rule is constitutional. Thus, as we show, the regulations eliminate the need to decide the constitutional issues at bar, and this Court should either dismiss the writ as improvidently granted in light of the supervening change in law, *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955), or apply the super-

vening regulations to the case at bar and affirm the judgment below. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-82 (1969). Cf. *Lau* v. *Nichols*, 414 U.S. 563 (1974).

In section III of this brief we show that Drew's rule unconstitutionally intrudes upon sexual, marital and familial freedoms secured to the individual by the Fourteenth Amendment's guarantee of liberty, for the rule is neither narrowly drawn nor supported by substantial justification. *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974); *Roe* v. *Wade*, 410 U.S. 113 (1973).

While Drew has finally abandoned the superintendent's claim that all unwed parents of illegitimate children are morally unfit (Br., pp. 4, 11; see Pet. App. 8-9 & n.7), it still maintains that all such parents are improper role models. In support of this hypothesis, Drew did not offer any evidence showing that the persons it employed and then terminated because of their parental status ever discussed this aspect of their private lives with students (Pet. App. 13, 32-33). Nor did Drew show that any school children knew that these persons were unwed parents of illegitimate children (*id.*). Having offered no proof on these critical factual matters, Drew presents a role model theory which is focused neither on the teacher's classroom behavior nor on conduct that is open and notorious. Under Drew's theory of role modeling school authorities may scrutinize any aspect of a teacher's private life and disqualify any teacher whose private conduct has not met the moral standards professed by the school authorities.

In contrast to Drew's sweeping view of role modeling, the experts who testified in this case made clear that a teacher cannot be a "model" for particular behavior or values unless the students, at a minimum, observe the teacher performing such behavior or espousing such

values or know that the teacher has done so. Drew's rule, however, purports to bar from school employment every person who has conceived an illegitimate child irrespective of whether the students are likely to know of such person's past or present marital and parental status. Thus, as we show, the rule is overbroad.

Furthermore, Drew's rule assumes that irrespective of what the unwed parent of an illegitimate child does or says in the classroom, students will indiscriminately choose to engage in premarital relations and to bear illegitimate children because an admired teacher has done so. As both lower courts found, such a hypothesis is "highly improbable, if not speculative" and "implausible" (Pet. App. 13, 33).

Finally, Drew's rule, far from being justified by educational considerations, has serious educational disadvantages. In barring unwed parents of illegitimate children from service in the schools as volunteer workers, PTA presidents, cafeteria workers, social workers, nurses, teacher's aides or teachers, the rule stigmatizes more than one-third of the children of Drew for being born out of wedlock and makes clear to their parents that they are unfit to engage in or publicly support school activities. It is difficult to conceive of sound education occurring in such a context.

In sum, we show that Drew's rule is overbroad and unsupported by any reasonable theory of role modeling and that the school district's professed goals, including prevention of schoolgirl pregnancies, can be better met by means less draconian than the rule at bar.

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II. THE COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED OR AFFIRM THE JUDGMENT BELOW ON THE BASIS OF SUPERVENING FEDERAL REGULATIONS.

Recognizing that issuance of a writ of certiorari is a matter of sound discretion exercised by the Court without the benefit of the record below or briefs on the merits, amicus NEA sets forth facts and reasons not briefed to the Court by petitioners or respondents in their respective petition for certiorari and opposition thereto which, in our view, warrant dismissal of the writ as improvidently granted. Alternatively, we urge that the judgment of the Court of Appeals be affirmed on the basis of supervening regulations adopted by the Department of Health, Education and Welfare to implement Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

A. The Writ Of Certiorari Should Be Dismissed As Improvidently Granted In Light Of The Peculiar Facts Of This Case And Supervening Federal Regulations.

1. *Factors Making this Case a Poor Vehicle for Review*

First, there is no conflict among the circuits which would enhance the importance of deciding the issues presented in this case.[2] Rather, as the District Court stated, this case is one of novel impression (Pet. App. 24).

[2] We have found five cases involving issues somewhat similar to those in the case at bar. In *Doe* v. *Osteopathic Hospital, Inc.*, 333 F. Supp. 1357 (D. Kan., 1971), the court held that Title VII prohibited a private employer from dismissing an office employee because of her unwed pregnancy. In *Cirino* v. *Walsh*, 321 N.Y.S.2d 493, 495 (Sup. Ct. N.Y. County, 1971), the court, relying on *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971), held that barring an unwed Puerto Rican mother from the position of school crossing guard "is not only arbitrary, but illegal as discrimination against her because of race and sex." In *Reinhardt* v. *Board of Education*, 19 Ill.App.3d 481, 311 N.E.2d 710 (1974), the court, relying principally upon a state tenure law, held unlawful the dismissal of a teacher because of her unmarried pregnancy. In *Drake* v. *Board of Education*, 371 F. Supp. 974 (M.D. Ala., 1974), the court held that cancellation of an unmarried pregnant teacher's contract violated her right of privacy because the school board obtained this information from her physician without the teacher's consent. In *Wardlaw* v. *Austin Independent School District*, 10 FEP 892 (W.D. Texas, 1975), the Court upheld the transfer of a teacher to a non-teaching position because of her unwed pregnancy. The latter case does not conflict in holding or principle with the case at bar since the District Court in this case expressly reserved the question of what steps might be appropriate where an unwed teacher is demonstrably pregnant during the school year (Pet. App. 34). Cf. *Leechburg Area School District* v. *Commonwealth Human Relations Commission*, 339 A.2d 850 (Commonwealth Ct. Pa., 1975) (invalidating maternity leave policy which protected pregnant females who were married and punished those who were unwed).

Second, it appears that Drew's rule is one of a kind. The Attorney General of Mississippi advised the District Court that this "subject . . . had never appeared before in the State of Mississippi" (Transcript of May 31, 1973, p.12). Dr. Buchanan, who was formerly employed in four Mississippi school districts and is now dean of a Mississippi teacher-training institution, testified that unwed parenthood does not arise sufficiently often in teaching to warrant rulemaking (Buchanan, 29, 56). Dr. Kenneth Clark, Member of the New York Board of Regents, and Drs. Edmund Gordon and Ronald Samuda, both of Columbia Teachers College, had never heard of such a rule before (Clark, 27; Gordon, 4, 14; Samuda, 35). Thus, insofar as this case turns upon the constitutionality of a rule that substitutes a conclusive presumption for individualized decision-making respecting the employability of unwed parents, the case appears to be a sport.

Third, this case bristles with constitutional issues of broad importance, many of which were not considered by the Court of Appeals. Among the constitutional issues not addressed by that court are the following:

(1) whether the rule unconstitutionally intrudes upon respondents' freedom of choice in sexual, marital and familial relations, *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Roe* v. *Wade*, 410 U.S. 113, 152 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974);

(2) whether the rule, because of its significant disparate effect on blacks, constitutes racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment; cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971);[3] and

[3] In *Griggs* this Court held that where facially neutral selection criteria have an exclusionary effect on minorities, such criteria are discriminatory within the meaning of Title VII unless the criteria are shown to bear a demonstrable relationship to successful job performance. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 n.14 (1973). Since *Griggs*, the courts of appeals almost uniformly have held that the prohibitions against discrimination embodied in the Fifth and Fourteenth Amendments incorporate the *Griggs* standard. *United States* v. *Chesterfield County School District*, 484 F.2d 70, 73 (4th Cir. 1973); *Walston* v. *County School Board of Nansemond County*, 492 F.2d 919, 924 (4th Cir. 1974); *Bridgeport Guard., Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333, 1337 (2d Cir. 1973); *Castro* v. *Beecher*, 459 F.2d 725, 732 (1st Cir. 1972); *Davis* v. *Washington*, 512 F.2d 956 (D.C. Cir. 1975), *cert. granted*, 44 U.S.L.W. 3179 (Oct. 6, 1975); *Douglas* v. *Hampton*, 512 F.2d 976 (D.C. Cir. 1975); *King* v. *New York City Civil Service Comm'n*, 6 EPD ¶ 8999 (S.D. N.Y., 1973); *Fowler* v. *Schwarzwalder*, 351 F. Supp. 721, 724 (D. Minn. 1972). See particularly *Douglas* v. *Hampton*, *supra*, 512 F.2d at 981, which notes that "No court has distinguished the standard mandated by the Fifth and Fourteenth Amendments from that specified by Title VII of the Civil Rights Act of 1964"; and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 n.14 (1973), where this Court relied not only on *Griggs* but also on two cases arising under the Fourteenth Amendment, *Castro* v. *Beecher*, 459 F.2d 725, 732 (1st Cir. 1972), and *Chance* v. *Board of Examiners*, 456 F.2d 1167, 1176 (2d Cir. 1972), for the proposition that where employment tests have an exclusionary effect on minorities "such requirements must be shown to bear a demonstrable relationship to successful performance of the jobs for which they were used." But see *Tyler* v. *Vickery*, 517 F.2d 1089 (5th Cir. 1975). See also *Cirino* v. *Walsh*, 321 N.Y.S.2d 493 (Sup. Ct. N.Y. County, 1971), where the court found that the rate of illegitimate births was significantly higher among Puerto Ricans than among whites and ruled, *inter alia*, that a decision to bar an unwed Puerto Rican mother from a position as a school crossing guard was racially discriminatory.

(3) whether the rule, because of its significant disparate effect on females, constitutes sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment; cf. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).[4]

2. *Federal Statutes and Regulations Bar Rules Which Absolutely Disqualify All Unwed Parents from Employment in the Public Schools.*

The special facts of this case make it, in our view, a poor vehicle for deciding the manifold constitutional issues presented. More significantly, however, recently enacted federal statutes and regulations—not applied below—will be dispositive of subsequent cases presenting issues similar to those at bar. Any need for adjudication of the constitutional issues presented by this case is significantly diminished, if not eliminated, by the broad remedial provisions of Title VII of the Civil Rights Act of 1964, as amended, and by Title IX of the Education Amendments of 1972, and HEW's regulations implementing Title IX.[5]

[4] See also *Cirino* v. *Walsh*, *supra*; *Reinhardt* v. *Board of Education*, 6 FEP Cases 235 (Ill. Cir. Ct. April 6, 1973), *aff'd on other grounds*, 19 Ill. App. 3d 481, 311 N.E.2d 710 (1974). Cf. *Leechburg Area School District* v. *Commonwealth Human Relation Commission*, 339 A.2d 850, 854 (Commonwealth Ct. Pa., 1975).

[5] In *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), this Court noted that "[t]he practical impact of our decision in the present cases may have been somewhat lessened" by the supervention of Title VII and EEOC Guidelines bearing on mandatory pregnancy leave (*id.* at 639, n.8). The Court decided *La Fleur* "in order to resolve the conflict between the Courts of Appeals" (*id.* at 638). That ground is not present in this case (see p. 6, *supra*, and n.2).

(a) *Drew's Rule Violates Title VII's Prohibition Against Employment Policies Which Significantly Disadvantage Blacks or Women and Cannot be Shown to be Demonstrably Job Related or Justified by Business Necessity.*

Effective March 23, 1972, Congress amended Title VII to provide that public employers, as well as private employers, would be subject to the prohibitions of Title VII.[6] Pursuant to Guidelines established by the Equal Employment Opportunity Commission and applied by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), selection criteria which operate to exclude a significantly disproportionate percentage of minority group persons (such as females or blacks)[7] are presumptively discriminatory and cannot pass muster under Title VII unless the employer shows that the criteria are demonstrably job-related or justified by business necessity. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431-32 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 n.14 (1973); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975).

In the wake of *Griggs*, Title VII has been applied to bar many varieties of facially neutral selection criteria which have a significant exclusionary effect on blacks or females when the employer cannot show that the selection criteria are justified by business necessity or are demonstrably related to successful job performance. Thus, policies barring employment to persons who have a record of arrests (*Gregory* v. *Litton System, Inc.*, 472 F.2d 631

[6] The complaint in the case at bar was filed on February 20, 1973. It does not allege that defendants' policies are contrary to Title VII. It does, however, allege that defendants' policies are racially and sexually discriminatory, thus presenting these issues in the context of the Equal Protection Clause (Pet. App. 4, n.1).

[7] Title VII prohibits discrimination on the basis of "race" or "sex." 42 U.S.C. § 2000e-2.

(9thCir. 1972)), a record of criminal convictions (*Green* v. *Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975)), or a record of two wage garnishments in the past twelve months (*Wallace* v. *Debron Corp.*, 494 F.2d 674 (8th Cir. 1974)) have been held to violate Title VII because no business necessity justified the significantly disproportionate impact of these policies on minority groups. Cf. *Doe* v. *Osteopathic Hospital, Inc.*, 333 F. Supp. 1357 (D. Kan. 1971) (Title VII held to prohibit a private employer from dismissing an office employee because of her unwed pregnancy).

There can be no doubt that Drew's rule barring unwed parents of illegitimate children has a significantly disproportionate impact on females and blacks. The record demonstrates that the rule has been applied to five persons—all female (Pet. App. 19, 21 n.6, 23 n.8). The superintendent acknowledged that the rule will bar significantly more females than males, for as he put it, "the unwed mother is stuck with the result" (Pettey, 24). As the Chief Justice observed in *Stanley* v. *Illinois*, 405 U.S. 645 (1972) (dissenting):

> "In almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood" (*id.* at 665).

The disparate racial impact of the rule is also manifest. All of the rule's five known casualties are black (Pet. App. 19, 21 n.6, 23 n.8). Statistics compiled by the Public Health Service show that in 1971 in Mississippi, 8,600 black children as compared to only 794 white children were born out of wedlock.[8] Statistics for the

[8] Public Health Service, Dept. HEW, *Vital Statistics of the United States 1971, Vol. I—Natality*, p. 1-187 (Table 1-70).

32 states which report legitimacy data to the Public Health Service confirm the significant adverse racial impact of any rule which bars the progenitor of an illegitimate child from school employment.[9]

In a later section of this brief we show that Drew's rule is not supported by any substantial justification (see pp. 21-29, *infra*). It suffices to say here that the Courts below found that the rule could not satisfy the traditional, minimal standards of due process and equal protection. Unless all of the judges below were far wide of the mark, the rule cannot survive Title VII's more onerous standard.

(b) *Drew's Rule Violates Title IX and Recent Regulations Promulgated Pursuant Thereto.*

Pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, HEW recently promulgated regulations that explicitly deal with sexually discriminatory rules relating to the employment of teachers and other employees of a public school system (40 Fed. Reg. 24143 (1975), § 86.51, *et seq.*). These regulations have been approved by the President (40 Fed. Reg. 24128) and cleared by the Congress prior to becoming effective.[10] They became effective on July 21,

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[9] In the 32 states reporting legitimacy data to the Public Health Service for the year 1971, there were 1,778,918 births. Of this total, 1,445,638 newborn children were white and 295,558 were black. These states reported 206,772 illegitimate births. 80,296 of these illegitimate children were white and 121,570 were black. Public Health Service, *supra* note 8, p. 1-195 (Table 1-71).

[10] Pursuant to Section 509(a)(2) of the Education Amendments of 1974, 20 U.S.C. § 1232(d)-(f), regulations implementing Title IX must be submitted to both Houses of Congress at least forty-five days in advance of their effective date so that the Congress, by concurrent resolution, may disapprove such regulations if it finds that the regulations are "inconsistent" with Title IX. HEW's regulations were submitted to the Congress, as required (40 Fed. Reg. 24128, ¶ 3), and were not thereafter disapproved.

1975—thirty-one days after respondents filed their brief in opposition to certiorari (40 Fed. Reg. 24137, § 86.1). The regulations are applicable to approximately 16,000 elementary and secondary school systems in the nation, including the Drew Municipal Separate School District.[11] In contrast to the constitutional provisions involved in this case, HEW's regulations deal specifically with the complex of values involved in sex discrimination, employment and public education, and thus should be a primary point of reference for disposing of the issues at bar.

Title IX provides, *inter alia*, that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681.[12] Pursuant to this statute, HEW has

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[11] Secretary Weinberger stated in a press release on June 3, 1975, that "Title IX is indeed far reaching in its sweep. It forbids sex discrimination in any educational institution receiving Federal assistance. This includes the Nation's 16,000 public school systems and nearly 2,700 post-secondary institutions." This press release, together with other materials pertinent to the promulgation of the Title IX regulations, is contained in U.S. Dept. of HEW, "Final Title IX Regulation Implementing Education Amendments of 1972 Prohibiting Sex Discrimination in Education." See note 12, *infra*, which shows that Drew is a recipient of federal funds and thus is covered by Title IX.

[12] Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § 241a, is a major source of federal funding for local school districts. The record shows that Drew employs a "Title I Administrator" and a Coordinator of Elementary Instruction who operates under the Title I program (McCorkle, 5, 10, 32; Pettey, 10). The record also shows that teacher's aides were hired "under Title I" (Burnett, 25). See also HEW's most recent directory which lists Drew among the thousands of school districts required to report faculty and student data by race because they are recipients of federal funds and as such must comply, *inter alia*, with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000-d. U.S. Dept. of Health, Education and Welfare, *Directory of Public Elementary and Secondary Schools in Selected Districts, Fall 1972*, pp. iii, 727, 1534.

promulgated regulations which sharply restrict school districts and other institutions of public education in making marital, parental or family status a criterion of employment. The regulations provide, *inter alia*, that:

> "A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is 'Miss or Mrs.'"
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> "A recipient shall not apply any policy or take any employment action: (1) concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex. . . ."
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> "A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom." 40 Fed. Reg. 24144, §§ 86.60(a), 86.57 (a)(1) and (b).

To be sure, the foregoing prohibitions are not absolute. They serve to identify prima facie forms of sex discrimination, and a school district may take action inconsistent with these rules. But, to do so, the school district must show that "such action is essential to successful operation of the employment function concerned" (*id.* at § 86.61).

In addition, the HEW regulations build upon Title VII's precepts[13] and bar facially neutral selection criteria which disproportionately exclude one sex unless the criteria are, at a minimum, demonstrably job related. Section 86.52 of the HEW Title IX regulations provides:

> "A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:
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> (a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and
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> (b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable" (40 Fed. Reg. 24143).

This regulation tracks the EEOC's Guidelines On Employment Section Procedures, 29 C.F.R. § 1607.3,[14] which were endorsed by this Court in *Griggs*, *supra*, 401 U.S. at 436.

This record illustrates the fact that any rule barring unwed parents from employment in the public schools almost certainly will exclude far more females than males (p. 11, *supra*). Thus, respondents or any other

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[13] HEW's explanation of Title IX's implementing regulations states that

> "Virtually all recipients subject to this Part 86 are also subject to title VII and many are also subject to the Executive Order [11246]. Except in the area of fringe benefits, where Subpart E of the title IX regulation differs from the title VII Sex Discrimination Guidelines of the EEOC, an employer who complies with the title IX regulation will generally be complying both with title VII and the Executive Order. It should be emphasized, however, that nothing in the title IX regulation alters any responsibilities that an employer may have under the Executive Order or title VII." 40 Fed. Reg. 24135 ¶ 87.

[14] Section 1607.3 ofthe EEOC Guidelines provides:

> "The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use."

school district which imposes a sweeping prohibition against unwed parents of illegitimate children must, under Title IX as well as Title VII, establish that such a rule is justified by business or educational necessity. Drew has not made such a showing (see pp. 21-29, *infra*), and it is unlikely that any employer could do so.

Because Title VII and Title IX are at least as broad as constitutional bars against race and sex discrimination and because these statutory provisions are likely to control any future cases presenting similar facts, this Court may appropriately avoid the manifold constitutional issues presented here and dismiss its writ as improvidently granted on the authority of *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955). In *Rice*, plaintiff contested the constitutionality of an Iowa decision which permitted cemeteries to deny burial to noncaucasians. The case came to this Court in the immediate wake of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and presented complicated questions of "state action" as well as the issue whether the Fourteenth Amendment condemned the practice complained of. Initially, this Court affirmed the Iowa Supreme Court's decision by an equally divided vote. On petition for reconsideration, however, the Court focused for the first time on a supervening Iowa statute which, while not applicable to the case at bar, would substantially diminish the public importance of the case. Paying special heed to the "Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion" and the impact of the supervening law, the Court determined to vacate its judgment and dismiss the writ as improvidently granted. *Rice* v. *Sioux City Cemetery*, *supra*, 349 U.S. at 74.

Dismissal of the writ is all the more appropriate here, for there is no conflict among the circuits, and the judgment below is consistent with the result that would be obtained under federal statutory law.

B. Alternatively The Judgment Below Should Be Affirmed On The Basis Of The Supervening Regulations Implementing Title IX.

In the event the Court should determine not to dismiss its writ as improvidently granted, we would urge the Court to affirm the decision below on the basis of the supervening regulations implementing Title IX. While these regulations were not extant at the time of either decision below, the facts and findings of the District Court bring the case squarely within the proscriptions of the regulations. Thus, the District Court concluded that the "essentially discriminatory effect of the Drew policy upon unmarried women is inescapable" and amounted to a suspect classification which was neither justified by a compelling state interest nor shown to be necessary for the operation of an educational program (Pet. App. 36-37).

Commencing at least with *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 64, 69 (1801), this Court has adhered to the principle that "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied . . . [and] in great national concerns . . . the court must decide according to existing laws. . . ." In *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-82 (1969), this Court held that supervening agency regulations, like constitutional, statutory or judicial changes in the law, must be applied by the reviewing courts unless such application would constitute a "manifest injustice" (*id.* at 282).[15] See also *California Bankers Ass'n.* v. *Schultz*, 416 U.S. 21, 49 n.21 (1974); *Bradley* v. *Richmond School Board*, 416 U.S. 696, 714-17 (1974).

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[15] In *Thorpe* this issue arose because the Supreme Court of North Carolina refused to apply retroactively to petitioners' case a circular issued by the Department of Housing and Urban Development governing eviction procedures. 393 U.S. at 281.

HEW's regulations implementing Title IX represent a supervening change in the law of sex discrimination and an appropriate standard for affirming the judgment below. Here, as in *Lau* v. *Nichols*, 414 U.S. 563 (1974), it is unnecessary for the Court to reach the constitutional issues because the school district, as a recipient of federal funds, is barred by federal regulations from pursuing the policy in question (*id.* at 566; see note 12, *supra*). Accordingly, if the writ of certiorari is not dismissed as improvidently granted, the judgment below should be affirmed on the basis of the regulations implementing Title IX.

III. DREW'S RULE IS UNCONSTITUTIONAL BECAUSE IT UNNECESSARILY AND UNDULY INTRUDES UPON RESPONDENTS' PRIVACY AND LIBERTY AND IS NOT JUSTIFIED BY SUBSTANTIAL EDUCATIONAL CONSIDERATIONS.

In this section we show that the Constitution bars state action which unduly intrudes upon an individual's sexual, marital and familial relations. In determining whether such intrusions are undue and therefore unconstitutional, this Court has required the state to demonstrate that any rule intruding upon these constitutionally protected interests is justified by substantial educational considerations and is not overbroad. As we show below, Drew's rule and the alleged justifications for that rule do not meet these constitutional criteria.

A. The Constitutional Standard Is That The Rule Must Be Supported By Substantial Justification And Be Narrowly Drawn.

The decisions of this Court establish that one's sexual, marital and familial relations are intensely personal interests which are constitutionally protected by (1) the right of privacy "implicit in the concept of ordered liberty," and (2) the explicit guarantee of liberty in the

Due Process Clause of the Fourteenth Amendment. Included within the protective ambit of these precepts are, as the Court said in *Roe* v. *Wade*, 410 U.S. 113, 152 (1973), "activities relating to marriage, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner* v. *Oklahoma*, 316 U.S. 535, 541-42 (1942); contraception, *Eisenstadt* v. *Baird*, 405 U.S. [438] at 453-54 [1972]; *id.* at 460-463, 465 (White, J., concurring in result); family relationships, *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925); *Myer* v. *Nebraska*, [262 U.S. 390 (1923)] *supra*." Twice, the Court has noted that "there is a right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 640 (1974), quoting *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972).

Before a State may intrude or impinge upon these personal liberties it must show, at a minimum, a substantial justification for the intrusion,[16] and both *Wade* and *LaFleur* make clear that, if the State intrudes upon the individual's sexual, marital, and familial relations, its rules or laws must be narrowly drawn. See also, *Turner* v. *Department of Employment Security and Board of Review of the Industrial Commission of Utah*, 44 U.S.L.W. 3298 (decided Nov. 17, 1975). Relying upon a substantial body of case law,[17] the Court in *Wade* said

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[16] In *Wade*, the Court held that the State must demonstrate a compelling state interest in order to justify any intrusion upon the female's decision to bear or abort a fetus. *Roe* v. *Wade*, 410 U.S. at 155.

[17] The Court cited *Griswold* v. *Connecticut*, 381 U.S. 479, 485 (1965); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 508 (1964); *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-08 (1940); and *Eisenstadt* v. *Baird*, 405 U.S. 433, 460, 463-64 (1972) (White, J., concurring).

that it is not enough that the State's interest be compelling: its "legislative enactments must be narrowly drawn." *Roe* v. *Wade*, 410 U.S. 113, 155. In *LaFleur*, the Court observed that the school district's pregnancy rules "surely" related to a legitimate state interest—insulating the children from a potentially incapacitated pregnant teacher. "But the question is whether the rules sweep too broadly. See *Shelton* v. *Tucker*, 364 U.S. 479. That question must be answered in the affirmative. . . ." *Cleveland Board of Education* v. *LaFleur*, 414 U.S. at 644.

As we read *LaFleur*, it establishes a standard for protecting privacy and liberty interests of teachers which falls between the traditional due process standard and the compelling interest standard of *Wade*. In *LaFleur*, the school boards urged that two state interests justified their pregnancy rules—(1) continuity of instruction, and (2) insulation of the classroom from teachers who are incapacitated by pregnancy. Both goals were held to be "legitimate" educational goals (414 U.S. at 641, 643). In pursuit of these goals, the school districts required that pregnant teachers terminate their service during the fifth or sixth month of pregnancy. As to the reasonableness of the cutoff dates, there was, in the Court's words, a "plethora of conflicting medical testimony" and the Court assumed arguendo that "at least some teachers become physically disabled from effectively performing their duties during the latter stages of pregnancy" (*id.* at 643-44).

The rules of the school boards would have satisfied traditional due process standards.[18] See *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960). But the cases involved an intrusion into the teacher's sexual, marital, and familial

[18] Mr. Justice Powell's concurring opinion concluded that the rules did not satisfy the traditional equal protection standard. *Cleveland Board of Education* v. *LaFleur*, *supra*, 414 U.S. at 656.

life. See *Weinberger* v. *Salfi*, 422 U.S. 749, 771-72 (1975) (*LaFleur* distinguished on grounds that basic human liberty was at stake). Because these constitutionally protected interests were at stake, the Court held that the due process standard not only barred arbitrary and capricious rules but also rules which "needlessly . . . impinge upon this vital area of a teacher's constitutional liberty" (414 U.S. at 640). The Court concluded that the overbroad pregnancy rules before it were required to be, but were not, justified by evidence in the record: "The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals" (*id.* at 647).

Clearly, under *LaFleur's* approach to due process, it is not sufficient that rules which intrude upon a teacher's sexual, marital, or familial life be free of bad faith and irrationality. They must be supported by substantial countervailing considerations which justify the intrusion, or the school authorities must proceed on a case-by-case basis. The Court's reasoning in *LaFleur* and its reliance on *Shelton* v. *Tucker*, 364 U.S. 479 (1969), establish that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose" (*id.* at 488).

B. Petitioners Have Not Demonstrated That The Rule Is Justified By Substantial Educational Considerations And Their Rule Is Overbroad.

The superintendent formulated his rule in the belief that all unwed parents of illegitimate children are immoral (Pet. App. 8-9 & n.7). Respondents expressly

abandon this purported justification for the rule and urge, as they did in the lower courts, that all unwed parents of illegitimate children are improper role models and that the rule helps to deter schoolgirl pregnancies (Br., 3-4, 11, 23 & n.7). Both lower courts rejected Drew's role model theory as "highly improbable, if not speculative," and "quite implausible" (Pet. App. 13, 33). The Court of Appeals also noted that the rule could not be salvaged on the ground that "the presence of unwed parents in a scholastic environment materially contributes to schoolgirl pregnancies [because that claim] is without support, other than speculation and assertions of opinion, in the record before us" (*id.* at 13).

As these findings and conclusions imply, Drew has failed to demonstrate that its rule is justified by substantial educational considerations. Indeed, it appears that Drew's rule stands in splendid isolation, for Drew has not shown that any other school district has formulated a similar rule and the experts were unaware of such rules (p. 7, *supra*). Moreover, as we show below, Drew's rule is overbroad and its role model theory does not support the rule, much less justify intruding upon the personal freedoms of school personnel. The rule also creates serious adverse educational and social consequences for more than one-third of the children of Drew who were born out of wedlock. Finally, as we show, there are means less drastic than the rule for obtaining the professed goals of the school district.

1. *Petitioners' "Role Model" Theory Is Inadequate* To Support Their Rule.

In support of their rule, petitioners advance their own "role model" theory. Educators use the terms "modeling and observational learning" interchangeably to refer to "behavior that is learned or modified as a result of observing the behavior of others. The person whose behavior is observed and imitated is the model." [19] In the case at bar the experts sensibly agreed that a child must perceive or know of a model's behavior before the child can imitate that behavior. (Clark, 3-8, 15-16, 20-21; Gordon, 3-9, 11-12, 26-28; Samuda, 2-7, 12-13, 26; Van Den Haag, 4-6, 10-11, 13, 16, 29-30, 33-41, 44; Stancil, 88-92. Cf. Buchanan, 27-31, 53-54).

Drew's rule is not confined to teacher behavior that is observed by or even known to the child. The rule is neither limited to unwed persons who are teaching in the classroom during pregnancy, nor to persons whose status as unwed parents otherwise may be readily detectable. Rather, the rule reaches all persons who have conceived illegitimate children including parents whose children have grown and moved away, females who bore their children outside the community and placed them for adoption, males who sired children and did not rear them, and females who bore children and subsequently married or chose to rear them in a family setting with grandparents and brothers and sisters of the parent. In short, petitioners would banish from the classroom every parent of an illegitimate child irrespective of whether, from the students' standpoint, such a person is a "model" for unwed parenthood.[20] Both lower courts properly rejected the role model justification for Drew's rule because the rule barred from employment persons whose behavior would not be revealed to the students and thus could not be imitated (Pet. App. 13, 33).

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[19] Sarason, *et al.*, Modeling and Role-Playing in the Schools: A Manual with Special Reference to the Disadvantaged Student, Human Interaction Research Institute, Los Angeles, Cal. (April 1973) at 6.

[20] The rule is overbroad in another respect. It applies not only to persons who work directly with the children in the classroom, but also to office secretaries, cafeteria workers, presidents of the PTA's, volunteer workers in the school and perhaps bus drivers and janitors (Pettey, 5-6, 8-9, 17, 19, 21-23; Pet. App. 23, n.8).

Furthermore, petitioners' role model theory is dubious even when the student knows that the teacher is an unwed parent of an illegitimate child. Petitioners' theory is that, irrespective of what the teacher says and does in the classroom, the student's sexual and family values may be shaped by his or her knowledge of unobserved conduct—*i.e.*, that the teacher conceived a child out of wedlock. Dr. Ronald Samuda, Assistant Dean for Program Development and Associate Professor of Education at Columbia Teachers College, testified that traditional views of role modeling are that "children learn when they see a prestigious person doing something in the classroom or wherever and when they see that person being reinforced or being rewarded [21] for [acting in a particular way]. Children then would tend to imitate those acts" (Samuda, 3, 12-13). For example, where schoolchildren observe their teacher washing her hands before the morning break for milk and cookies, they may be expected to imitate that conduct, at least if told to do so. But under Drew's rule, as Dr. Samuda testified, "it seems to me that we are talking about . . . an in-

[21] There are many studies showing that reinforcement (observed rewards or punishment for the model) is generally necessary in order to drive home to the child the lessons that are being portrayed by the model. Frayer, *et al.*, Modeling as a Technique for Promoting Classroom Learning and Pro-Social Behavior, Wisconsin Univ., Madison. Research and Development Center for Cognitive Learning (October 1972) at 8, 15; Sarason, *et al.*, Modeling and Role-Playing in the Schools: A Manual with Special Reference to the Disadvantaged Student, Human Interaction Research Institute, Los Angeles, Cal. (April 1973) at 6-8, 13, 42, 48; S. Thomas, Modeling and Imitation Learning in Young Children: An Abstract Biography, ERIC Clearinghouse on Early Childhood Education, Urbana, Ill. (April 1973) at 7-8; A. Prakash, *Effect of Modeling and Social Reinforcement on the Racial Preferences of Children*, 1973 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY (Abridged version, Ph.D. Dissertation, University of Montana); J. Bryan, *Model Affect and Children's Imitative Altruism*, 42 CHILD DEVELOPMENT 6 (December 1971) at 2061, 2065; Grusec, *et al.*, *Model Nurturance, Demand Characteristics of the Modeling Experiment, and Altruism*, 14 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 4 (1970) at 214.

ferential value system. And in my opinion, if there is no evidence of overt behavior and of the proselytizing of extramarital sex, then I can see no correlation whatsoever between being an unwed mother and being a competent teacher" (*id.* at 13).

Indeed, petitioners' theory is based upon pure speculation rather than studies or other proof. The theory assumes, without supporting studies, that a teacher is a model for family values and sexual mores (cf. Gordon, 12). Furthermore, petitioners' theory assumes that students will indiscriminately choose to have premarital relations because they know that a teacher whom they admire has had them. A recent study, to the contrary, concludes that "The child does not indiscriminately imitate all responses by all potential models. Ambivalence in identification may be observed when he [the child] reaches the point in development at which he can respond cognitively to the identifications he has formed." Sarason, *et al.*, *supra* note 19, at 11.[22] Stated more plainly, this study rejects Drew's "monkey-see, monkey-do" approach and recognizes what every parent knows—that postpubescent children have independent powers of thought and discernment. See A. W. Kay, MORAL DEVELOPMENT (1969), pp. 96-97. See also the opinion of the District Court, Pet. App. 33.

2. *The Stigmatizing Effect of Petitioners' Rule Upon the Illegitimate Children of Drew and their Parents Outweighs the Hypothetical Risk that a Student may be Adversely Influenced by the Purported Model Effect of an Unwed Parent.*

In our view, the speculative nature of the superintendent's role model theory does not remotely approach the substantial justification that might warrant intrusion

[22] See also J. Getzels, *The Acquisition of Values in School and Society*, THE HIGH SCHOOL IN A NEW ERA. (1958), p. 147.

upon the liberty and privacy interests at issue here. In testing the substantiality of the justification offered in support of Drew's rule, the Court appropriately may consider the serious educational disadvantages which, according to this record, flow from the rule.

Eighty percent of the children in the public schools of Drew are black (Pet. App. 24). Approximately 44.6 percent of these black children were born out of wedlock[23] (Br., p. 27); yet the superintendent evidently never considered the adverse educational impact of a rule which banishes the parents of all illegitimate children from teaching, working in the school cafeteria, working in the school office, volunteering to do school work, serving as PTA president, and perhaps even serving as a bus driver or janitor (Pettey, 21-23).[24]

By disqualifying from school employment all persons who have sired or borne an illegitimate child, the rule stigmatizes all illegitimate children in Drew and their parents. As one black resident of Sunflower County observed, the rule conveys to the illegitimate child "that it, too, is not fit" (Hamer, 81). The rule also teaches the child that its parents are unfit and discourages, if not bars, such parents from working closely with the school and participating in or publicly supporting school

[23] The superintendent stated that the percentage of whites born out of wedlock was approximately one-half as great as the percentage of blacks born out of wedlock (Pettey, 27). Petitioners state that 35.2 percent of the births in Sunflower County in 1971 were out of wedlock (Br., p. 23).

[24] While the record is replete with the superintendent's moral precepts and role model theory, it is bereft of evidence showing that the superintendent ever considered whether it would be more damaging to the children of Drew to bar all unwed parents from school-related positions than to take the hypothetical risk that a student might be influenced to have premarital relations because his or her teacher has had them.

activities. These considerations led Dr. Kenneth Clark to conclude that the rule

> "is a dehumanizing rule in that it imposes upon human beings a stigma which to me is absolutely unnecessary, except in terms of cruelty. It imposes a stigma, an unnecessary stigma, on the children who are the products of . . . the unwed situation of the mother, and it imposes a discriminatory cruelty upon the mother. I see no other function for such a rule. It certainly has no intrinsic educational function. . . . Is has, as far as I can see, only a dehumanizing function" (Clark, 26-27).

In sum, the rule denigrates more than one-third of the children in the Drew school system and their parents to the inevitable detriment of sound education, and this consequence of the rule should be taken into account by the Court in determining whether the rule is justified by substantial considerations of educational policy.

3. *There are Less Drastic Means for Achieving the School District's Goals.*

Drew urges that its rule is justified because it will "help to decrease" the rate of schoolgirl pregnancies and illegitimate births in the school district (Br., pp. 4, 23 & n.7). There are, however, much less drastic means available to accomplish this end than barring all progenitors of illegitimate children from the classroom. Just as Drew devotes a specified number of hours each year to the subject of alcoholism and is encouraged to do the same with respect to drug abuse (Miss. Education Code §§ 37-13-25 through 35; 37-13-43 through 51), so too, it may deal with the social and/or moral problems associated with premarital relations by youngsters.[25] Indeed, it is more

[25] The portion of the record available to us does not indicate whether Drew provides cognitive training in sex education and morals (see note 1, *supra*).

reasonable to deal with these problems through individual and group counselling or as subjects for classroom instruction than to rely upon the modeling effects of a silent corps of "virtuous" teachers.[36]

4. *There are no Reasonable Limits to the Role Model Theory if It Extends Beyond Classroom Behavior and Open and Notorious Conduct.*

Amicus' greatest concern with this case arises out of the extraordinary reach that petitioners assign to role modeling. Petitioners do not claim that any of the teachers who are parents of illegitimate children have mentioned this aspect of their private lives in the classroom, much less proselytized their classes. Nor have petitioners shown that any school children knew that their teachers were the parents of illegitimate children, though this knowledge is vital to their thesis that children will emulate their teachers. Instead, petitioners would make relevant, indeed critical, teacher conduct which is neither open and notorious nor connected with school activities.

Under petitioners' role model theory, any private conduct of a teacher which does not accord with the moral standards professed by the school authorities would constitute grounds for disqualification from school employment. Drew's concept of role modeling would invite the board and the superintendent to scrutinize the single teacher's social life, the married teacher's matrimonial

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[36] In a footnote Drew quotes testimony suggesting that unwed parents of illegitimate children may either explicitly encourage illegitimacy and premarital relations or be ineffectual in discouraging such phenomena (Br., p. 7 & n.5). These concerns are particularly suited to examination in the employment interview process. Rather than barring all unwed parents, an interviewing officer could readily inquire of the applicant how he or she would handle discussions or questions concerning illegitimacy and premarital relations and evaluate the answer.

difficulties, and a host of personal decisions regarding, *inter alia*, smoking, use of alcoholic beverages and lawful abortion. To sanction petitioners' theory would permit an unacceptable encroachment upon the personal liberties of millions of teachers in our nation's public schools.

5. *Summary*

Drew has not presented a substantial justification for its rule. The rule is overbroad and unnecessarily intrudes upon the liberty and privacy of school personnel. To the extent that Drew seeks to deter schoolgirl pregnancies, there are less drastic and more effective means for accomplishing that end than enforcing a rule which intrudes upon the private lives of teachers and stigmatizes more than one-third of the children of Drew and their parents. To the extent that Drew conclusively presumes that all unwed parents of illegitimate children are improper role models, Drew has espoused a theory of role modeling which is unreasonable.

Drew's theory of role modeling does not focus upon the teacher's classroom behavior or conduct which is open and notorious. Rather, it focuses upon the private sexual, marital and familial relations of the teacher, and assumes that these matters will be known to the students and will be indiscriminately imitated by them. Such speculation does not constitute the substantial justification which the Constitution requires as a precondition for invading the privacy and liberty of teachers.

CONCLUSION

For the reasons set forth in Section II of this brief, the Court should dismiss its writ of certiorari or affirm the judgment below on the basis of the supervening regulations which implement Title IX of the Education Amendments of 1972. In the event that the Court does neither, it should affirm the judgment below because Drew's rule unconstitutionally intrudes upon respondents' liberty and privacy.

Respectfully submitted,

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No. 74-1318

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In the Supreme Court of the United States

OCTOBER TERM, 1975

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
PETITIONERS

v.

KATIE MAE ANDREWS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

It has come to our attention that on January 26, 1976, this Court granted the motion of the National Education Association for leave to file a brief as *amicus curiae* and that the NEA brief suggests that the writ of certiorari in this case be dismissed as improvidently granted or, in the alternative, that the judgment below be affirmed on the basis of supervening regulations which the United States Department of Health, Education, and Welfare promulgated under Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. (Supp. IV) 1681 *et seq.* We are filing this *amicus* memorandum in light of the clear federal interest in the Title IX issue. Since we agree that future cases concerning policies such as the one at issue in this case are likely to be litigated within the context of Title IX and its regulations, 45 C.F.R. Part 86, we

concur in NEA's suggestion that the existence of that statute diminishes the need for resolving the broad constitutional issues briefed by the parties.

1. Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. (Supp. IV) 1681 *et seq.*, which became effective on July 1, 1972, provides in relevant part that (20 U.S.C. (Supp. IV) 1681(a)):

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.[1]

As directed by that statute (20 U.S.C. (Supp. IV) 1682), the Department of Health, Education, and Welfare promulgated regulations which were signed by the President and reviewed by the Congress (45 C.F.R. Part 86, as added, 40 Fed. Reg. 24128), and which became effective on July 21, 1975, while this Court had under consideration the petition for certiorari filed by the school district in this case. Certain of those regulations would be applicable to a school district policy such as that at issue here.

Section 86.52 of the Regulations (40 Fed. Reg. 24143) provides:

> A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:
>
> (a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

[1]The record reflects that Drew Municipal Separate School District receives federal assistance in the administration and execution of its educational program (App. 11, 14).

> (b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

In our view, a policy which unqualifiedly excludes, from employment in education, all persons who are parents of illigitimate children has a demonstrable "disproportionately adverse effect" on women; and where, as in the present case, that criterion for exclusion from employment is not validated as a predictor of successful job performance, its use is prohibited under Title IX. As recognized by the Chief Justice in his opinion in *Stanley* v. *Illinois*, 405 U.S. 645, 665:

> In almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood.[2]

Also applicable to a policy such as the one at issue here is Section 86.57(a)(1) (40 Fed. Reg. 24144), which states:

[2]The district court here, using the same reasoning, found that an unwed parent rule inevitably has an adverse effect on women and illustrated that point with references to the record in this case. The Superintendent conceded the difficulties of identifying unwed fathers and admitted that he had not alerted the staff member who administered the policy to these difficulties (App. 39-40). That staff member thereafter testified that she knew that a certain male teacher's aide was not the father of an illegitimate child, "because he is married" (App. 55). A disparate sexual effect is thus inevitable even though the rule itself professes neutrality.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; * * *

To the extent that the effect of an employment policy such as that applied by Drew Municipal Separate School District is to treat unmarried females differently from unmarried males, it would also violate this provision.[3]

2. Although Title IX has not been interpreted in any court action of which we are aware, the regulations under that Title generally follow the Equal Employment Opportunity Commission's Sex Discrimination Guidelines which have been upheld in other factual contexts by several courts of appeals.[4] Those guidelines, which are promulgated under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e *et seq.*, indicate that an employer may not use employment criteria which restrict the employment opportunities of women on the basis of marital status but are not equally applicable to

[3]In addition, Section 86.60(a) of the Regulations (40 Fed. Reg. 24144) prohibits a recipient of federal financial assistance from making pre-employment inquiry as to the marital status of an applicant, including whether the applicant is "Miss or Mrs."

[4]*Gilbert* v. *General Electric Co.*, 519 F.2d 661 (C.A. 4), certiorari granted, Nos. 74-1589 and 74-1590 (argued January 19 and 20, 1976); *Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F.2d 199 (C.A. 3), certiorari granted, No. 75-1245 (argued January 19, 1976); *Communications Workers of America* v. *American Telephone and Telegraph Co.*, 513 F.2d 1024 (C.A. 2), petition for certiorari pending, No. 74-1601; *Hutchison* v. *Lake Oswego School District*, 519 F.2d 961 (C.A. 9); *Farkas* v. *Southwestern City School District*, 506 F.2d 1400 (C.A. 6), affirming 8 E.P.D. par. 9619 (S.D. Ohio); *Holthaus* v. *Compton & Sons, Inc.*, 514 F.2d 651 (C.A. 8). See also *Tyler* v. *Vickery*, 517 F.2d 1089 (C.A. 5).

men.[5] Of course, under Title VII, an employment policy involves a discrimination on the basis of sex even though it applies only to some women if it does not apply to men. See, *e.g.*, *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542; *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (C.A. 7), certiorari denied, 404 U.S. 991.[6] Moreover, under Title VII, an employment criterion which has a substantial statistically disparate effect against a protected class is in *prima facie* violation of the Act. *E.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424.

CONCLUSION

Since it is likely that the specific provisions of Title IX and its regulations will be dispositive of future cases concerning fact situations similar to those of this case and may well govern the instant case, we agree with the suggestion of *amicus* NEA that it would be appropriate

[5]See 29 C.F.R. 1604.4(a), which provides as follows:

> The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

[6]The Title VII sex discrimination guidelines provide that an employment policy which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of the statute. 29 C.F.R. 1604.10(a). That guideline does not distinguish between married and single women, and it has been held that Title VII prohibits discrimination against pregnant single women equally with such discrimination against pregnant married women. *Doe* v. *Osteopathic Hospital of Wichita*, 333 F. Supp. 1357 (D. Kan.). While that guideline is not directly applicable to the facts of this case, the policy at issue would seem to apply to an unwed female who became pregnant during the period of employment or at the time of application.

for the Court to dismiss the writ of certiorari as improvidently granted.

Respectfully submitted.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
Petitioners,

vs.

KATIE MAE ANDREWS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

ARGUMENT

I.

The Rule Bears a Rational Relationship to a Legitimate Government Interest

If the right to be educated is not "among the rights afforded explicit [or implicit] protection under our Federal Constitution," *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 35, then from what fundamental document do plaintiffs draw for explicit or implicit protection for the "right" to educate? *Board of Regents* v. *Roth*, 408 U.S. 564, and *Perry* v. *Sindermann*, 408 U.S. 593, instruct that no such "right" exists.

Petitioners are called upon once again to inform Respondents that the rule in question was not promulgated nor implemented to drive from the school system teachers and teacher aides who lack the proper character or morality to teach the children of this school district. Respondents set up this "straw person" and then bombard it with due process arguments. The office of the rule is to arrest and hopefully reverse the alarming rise in the illegitimate birth rate in the Drew School system. It is hard to conceive how anyone can quarrel with such as being a legitimate government interest.

It was the considered judgment of the superintendent and school district that a parent of a child born out of wedlock would add to the task of the school district rather than assist in achieving its goal.

Role modeling is not a new concept to this Court. As recently as January 30, 1976, certain provisions of the Federal Election Campaign Act of 1971 were held constitutionally justified although measured by the rigorous "compelling interest standard" because the primary purpose of such provisions was "to limit the actuality and *appearance* of corruption from large individual financial contributions. . . ." (Emphasis added) *Buckley* v. *Valeo*, No. 75-436, ... U.S. ....., p. 21. Continuing, the Court elucidated upon this role model concept by stating that "Congress was justified in concluding that the interest in safeguarding against the *appearance of impropriety* requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." (Emphasis added) p. 24. Again at page 27 of the opinion, the Court writes of the "appearance of corruption." At page 52 we find the language, "appearance of improper influence."

The Chief Justice had little difficulty in concurring in the finding of constitutionality of the disclosure provisions

of the Act even though they admittedly impinge on First Amendment rights because of the "legitimate public interest [in] the elimination of the *appearance* and reality of corrupting influences." (Emphasis added) p. 2.

Sounding a similar judicial note, Mr. Justice Marshall dissented from the majority in regard to the spending limitation placed upon a candidate's private funds. Although admitting that such limitation affects the candidate's exercise of his First Amendment rights, the Justice opined that the provision was constitutional since Congress had a compelling interest "in promoting the reality and *appearance* of equal access to the political arena." (Emphasis added) pp. 2, 3. The Justice was further concerned that even the "*perception* that personal wealth wins elections may . . . undermine public confidence in the integrity of the electoral process." (Emphasis added) p. 3. Mr. Justice Marshall stated it was of great moment that "candidacy for public office not become, or *appear to become*, the exclusive province of the wealthy. . . ." pp. 3-4.

Mr. Justice White, concurring in part and dissenting in part, agrees that Congress had a sufficient government interest in preventing not only actual undue influence that large contributors would have but also that which "the public might *think* they would have. . . ." (Emphasis added) p. 4. Further, the Justice wrote that it "is critical to obviate or dispel the *impression* that federal elections are purely and simply a function of money, . . ." (Emphasis added) p. 10. The Justice was even concerned that any "notion" that an election outcome was based primarily on money would do grave harm to the national interest. p. 11.

These pronouncements of concern for role models and appearances in the public arena are not of recent court vintage. Although they are woven from the basic fibers of this nation, they were never more eloquently stated than

in *CSC* v. *Letter Carriers*, 413 U.S. 548, 565, when the Court wrote:

> ". . . [I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."

SEE: *Peters* v. *Kiff*, 407 U.S. 493.

If concern for reality and *appearances* has occupied the judicial thoughts of this Court for these many years, can it be gainsaid that concern for reality and *appearances* of school personnel is not only of rational interest to Petitioners, but is of compelling interest.

Promulgation and implementation of the rule in question are within the power of the School District and "cannot be condemned because it curtails the power of the individual to contract." *Alaska Packers Assn.* v. *Industrial Accident Commission of the State of California*, 294 U.S. 532, 543.

II.

The Rule Does Not Impermissibly Invade Any Constitutionally Protected Right of the Respondents

Respondents argue that they have a constitutionally protected right to bear illegitimate children and therefore, since this rule impinges upon that right, it is unconstitutional. This position misses the point. Assuming arguendo that such right exists, this Court is on record that no such rights are absolute. They can be impinged upon by a paramount interest of the government.

The right to procreate has never been declared to be absolute. The Court in *Buck* v. *Bell*, 274 U.S. 200 (1927) held constitutional a statute which provided for the sterilization of a feebleminded inmate of a state institution. The continuing vitality of this decision is attested to in *Roe* v. *Wade*, 410 U.S. 113, 154. Citing *Buck* v. *Bell*, supra, the Court wrote that it "has refused to recognize an unlimited right of this kind in the past." Such a right, if it exists, must give way to the paramount right of the School District.

More fundamentally, the plaintiffs misconceive the Drew regulation. They view it as a rule which limits births, whereas it only limits employment opportunities. It does not interfere with the *decision* to procreate but merely circumscribes some employment opportunities because of the consequences to school children.

Moreover, the vast opportunities for employment free of the Drew rule reveal the Drew rule is not one of social control. It is one conceived for valid educational purposes. Outside the context of role modeling in educational institutions there is ample play for individual rights to procreation.

Further, the Court has acknowledged that certain rights which are derivative from the right of privacy may be curtailed when the exercise of such rights leave the area of privacy and enter the public domain. *United States* v. *12 200-Ft. Reels*, 413 U.S. 123.

Mr. Justice Holmes, writing for the Court in *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, opined:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other

than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." p. 355.

This Court is on record that the fact that a regulation forces an individual to make a choice even though the making of such choice may impinge upon a constitutional right, does not make the regulation itself unconstitutional. *Johnson* v. *Robinson*, 415 U.S. 361, and *Gillette* v. *United States*, 401 U.S. 437.

III.

Mere Statistical Data Cannot Satisfactorily Undermine the Constitutionality of the Rule

Respondents argue that the statistics in the record reflect that the rule comes down harder upon blacks and females than it does upon whites and males. Therefore, it is unconstitutional as a sex and/or racially discriminatory classification.

This position of respondents is at war with a clear body of law holding that an otherwise legitimate classification does not become unconstitutional simply because greater numbers of a racial minority or sex group is disadvantaged by the classification. *Jefferson* v. *Hackney*, 406 U.S. 535; *James* v. *Valtierra*, 402 U.S. 137; *Geduldig* v. *Aiello*, 417 U.S. 484.

Respondents further make the argument that the rule cannot be applied to males since it is too difficult to prove paternity. While acknowledging that there may be a greater burden in proving paternity of an illegitimate child, this in and of itself cannot affect the constitutionality of a regulation. The School District's legitimate prerogative to make classifications based on parenthood of illegitimate children is highlighted from language of the Court in *Gomez* v. *Perez*, ... U.S. ..... There, the Court struck down a Texas statute which allowed a natural father to escape support of his illegitimate children while fastening upon him a continuing duty to support his legitimate children. The Court avoided the speculative barriers of ascertaining paternity and held that illegitimate children could not be denied support from their natural parents. As the Court phrased it:

> "We recognize the lurking problems with respect to proof of paternity. These problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."

IV.

The Rule Does Not Create a Sex-Based Classification

The rule in question operates against males as well as females.

This case is not controlled by *Frontiero* v. *Richardson*, 411 U.S. 677 or *Reed* v. *Reed*, 404 U.S. 71. In *Frontiero* the Court held that the government could not deny to female employees both substantive and procedural benefits granted males "solely . . . for administrative convenience." p. 690. In *Reed* the Court struck down a provision of the Idaho Probate Code because its purpose was merely to reduce the workload on probate courts by eliminating one class of contest. The Court struck down in *Stanley* v. *Illinois*, 405 U.S. 645, an Illinois statute which created a presumption that an unwed father of an illegitimate child was an unfit parent and denied such father a due process hearing to determine his fitness. The Court was of the opinion that the denial of such a hearing to the father "solely because

it is more convenient to presume than to prove" would not justify such a statute. The Court determined that Illinois' desire to save money by not providing such a due process hearing was insufficient to protect the statute from a constitutional attack. The Court emphasized that "the Constitution recognizes higher values than speed and efficiency." p. 656. In *Stanley* the Court explained its rationale for striking down a Texas statute in *Carrington* v. *Rash*, 380 U.S. 89, stating in Footnote 8 that *Carrington* teaches that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State."

It is instructive to note the Court's upholding as constitutional preferential treatment of females in *Kahn* v. *Shevin*, 416 U.S. 351 and *Schlesinger* v. *Ballard*, ... U.S. ..... The Court allowed preferential treatment in these cases since the governmental entities concerned had legitimate interest in making such classifications.

V.

Respondents to Whom the Rule May Constitutionally Be Applied Cannot Challenge the Rule on the Ground That It May Conceivably Be Applied Unconstitutionally to Others, in Other Situations Not Before the Court

The courts below and the Respondents here attempt to gain mileage from the fact that the rule in question embraces certain categories of individuals described as innocent parties, e.g., childbirth incident to criminal rape. This the Respondents cannot do since they lack the proper vehicle. Neither of the Respondents fall in such a category. The record herein reflects that Respondents voluntarily engaged in the illicit conduct which brought them within the ambit of the rule.

Mr. Justice Brennan, writing for the Court in *United States* v. *Raines*, 362 U.S. 17, 20 and 21, stated:

> "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power—'the gravest and most delicate duty that this Court is called on to perform.' Marbury v Madison (US) 1 Cranch 137, 177-180, 2 L ed 60, 73, 74. [362 US 21] This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, N. Y. & P. S. S. Co. v Commissioners of Emigration, 113 US 33, 39, 28 L ed 899, 901, 5 S Ct 352. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. [Cited cases omitted]"

Acknowledging that this principle of constitutional adjudication has lost none of its vitality, Mr. Justice White

speaking for the Court, reaffirmed in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610, 611 that:

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. [Cited cases omitted]."
>
> "A closely related principle is that constitutional rights are personal and may not be asserted vicariously. See McGowan v. Maryland, 366 U.S. 420, 429-430, 6 L.Ed. 2d 393, 81 S.Ct. 1101 (1961). These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. See Younger v. Harris, 401 U.S. 37, 52, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971). Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court:
>
> 'So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.' Marbury v. Madison, 1 Cranch 137, 178, 2 L.Ed. 60 (1803)."

To the same sense of the Court is *Parker* v. *Levy*, 417 U.S. 733, 760, wherein Mr. Justice Rehnquist opined for the Court:

> "This Court has, however, repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . .' United States Civil Service Comm'n v. National Association of Letter Carriers, 413 U.S. 548, 580-581, 37 L.Ed.2d 796, 93 S.Ct. 2880 (1973)."

Petitioners acknowledge that this Court has recognized certain exceptions to this fundamental rule, but suggest that the rule in question in the case sub judice does not come within the ambit of any of the pronounced exceptions.

VI.

A Reform Measure Is Not Invalid Because It Does Not Address All Phases of a Problem

Respondents in their brief suggest that Petitioners had other methods and means to combat the critical problem of an alarming increase in the rate of illegitimate births among school children in the Drew community, e.g., "furnishing of contraceptive supplies and information." Brief of Respondents, p. 47. This Court as recently as January 30, 1976, rejected out of hand such a contention in *Buckley* v. *Valeo*, No. 75-436, ... U.S. ..... The Court held:

"The governing principle was stated in Katzenbach v. Morgan, 384 U.S. 641, 657 (1966):

> "'[I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," Roschen v. Ward, 279 U.S. 337, 339, that a legislature need not "strike at all evils at the same time," Semler v. Dental Examiners, 294 U.S. 608, 610, and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," Williamson v. Lee Optical Co., 348 U.S. 483, 489. [Cited footnote omitted.]'" Opinion, p. 99.

The fact that Petitioners have selected the method now in question as a means to accomplish a legitimate purpose can be of no concern to this Court merely because other methods are available which may or may not serve the same legitimate purpose. Further, Petitioners submit that the methods suggested by Respondents will not accomplish the same purpose.

CONCLUSION

Petitioners re-submit their position that the school district rule is neutral as to sex and race and does not violate the Due Process Clause and/or Equal Protection Clause of the Fourteenth Amendment or any other mandates of the Constitution or laws of the United States. The Court should not strike down the policy, promulgated from necessity, in order that the school officials may not be in-

hibited in the carrying out of their appointed role to educate the youth of the local school district.

Respectfully submitted,

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